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No. 15414

United States
Court of Appeals
for the Ninth Circuit

PETER HOLZ, also known as Peter Holz-Muller,
Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization at Los Angeles, California and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration Service at Los Angeles, Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

MAR 12 1957

PAUL P. O'BRIEN, CLERK

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Court of Appeals
for the Ninth Circuit

PETER HOLZ, also known as Peter Holz-Muller,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Los Angeles 12, California.

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 18907-Y

PETER HOLZ, also known as PETER HOLZ-
MULLER, Petitioner,

VS.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization at Los Angeles, California, and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration Service at Los Angeles, Respondents.

PETITION FOR JUDICIAL REVIEW, DE-
CLARATORY JUDGMENT AND INJUNC-
TIVE RELIEF

The petitioner, Peter Holz, also known as Peter Holz-Muller, hereinafter designated as Peter Holz, respectfully alleges:

I.

This is an action for Judicial Review under the Administrative Procedure Act (5 U.S.C. 100 et seq.) for a declaratory judgment under the Declaratory Judgment Act (28 U.S.C. 2201) and for injunctive relief, and for judicial review of:

(1) A final order granting petitioner voluntary departure from the United States with the added provision that petitioner be deported if he does not depart voluntarily;

(2) The administrative processes of the Immigration and Naturalization Service; and

(3) An order of the said service denying a stay of deportation pending a determination of petitioner's petition to reopen and reconsider the order of the Special Inquiry Officer entered June 7, 1954.

II.

The respondent, Albert Del Guercio, is the Acting District Director of Immigration and Naturalization at Los Angeles, California, and respondent, Joseph A. Dummel, is a Special Inquiry Officer attached to said Immigration and Naturalization Service.

III.

Petitioner was born on April 30, 1931, at Banat, Rumania, and is a citizen of Rumania.

IV.

Petitioner is now married to a legal resident of the United States, has established a home, and is regularly employed as a machinist in the County of Los Angeles, State of California.

Petitioner's ancestry is French-German and his religion, as well as that of his parents, is Roman Catholic. He was admitted to the United States for permanent residence at New York, New York, on May 27, 1950, upon presentation of non-preference quota immigration visa No. 22650 issued to him by the American Vice Consul at Munich, Germany, on April 15, 1950. Petitioner's father, mother and only sister reside in the County of Los Angeles, State of California, they having emigrated to the United States with him.

V.

Prior to the onset of World War II, and, more particularly, on or about June 29, 1939, because of the unrest in Rumania and the persecution of persons of German ancestry, he went with his family to Vienna, Austria. From there the family went to Krefeld, Germany, in August, 1939. Because of the bombings suffered in Krefeld, petitioner and his family returned to Vienna where they remained until June, 1942. Petitioner and his family then returned to Banat, Rumania where they remained until September 25, 1944. They were forced to flee Banat to escape the Russian occupation. They arrived in Vienna on or about October 14, 1944. During his stay in Vienna, he was subject to constant bombings. On April 15, 1945, he left Vienna with his family on account of the Russian occupation of the city.

During his entire youth he was constantly subjected first hand to the rigors of war and observed that both the German and Russian armies "impressed" natives into military service, and, when the area was recaptured by the Russians or Germans, as the case may be, these same natives who were "impressed" into service were executed by the reoccupying army on the ground that they had served as "volunteers."

VI.

Petitioner arrived in New York on May 27, 1950 and left immediately for California where he lived with his parents as caretakers on a ranch in Thousand Oaks, California. On August 7, 1950, he

registered at Local Board No. 83 of the Selective Service System, located at 239 East Olive Ave., Burbank, California and on December 18, 1950, upon his application, he received a declaration of intention to become a citizen of the United States issued by the Clerk of the United States District Court at Los Angeles, California.

VII.

On or about March 4, 1952, he received a notice from the aforementioned local board ordering him to report to the local board for induction. Petitioner at said time spoke practically no English and, at the present time, his knowledge of the English language is meager. Petitioner stated to the members of the board that he did not object to induction but that he wanted to be a citizen before being inducted because he did not want to be classified as a volunteer because, if sent to areas where Russian troops were possible adversaries, he might be captured and treated in the same way as he had seen the Russians treat so-called "volunteers" in Rumania and Germany. At no time was petitioner represented by counsel nor did he understand his rights and duties.

VIII.

At the time petitioner was called for induction, 50 U.S.C.A. App., Section 454, was in full force and effect. This section provides, among other things, that an alien shall be relieved from liability for training and service in the armed forces if, prior to his induction into the forces, he has made

application to be relieved from such liability in the manner prescribed by and in accordance with the rules and regulations prescribed by the President but any alien who makes such application shall thereafter be debarred from becoming a citizen of the United States. Petitioner was not advised of this section of the law nor was he able to comprehend the proceedings before the local draft board.

IX.

Because of his youth and experiences as a child and inability to comprehend the language, petitioner felt he was being impressed into service in much the same manner as he had seen the Russians and Germans do it. However, on March 4, 1952, he reported to 1155 West Washington Blvd. in accordance with the induction order and again demanded to be made a citizen and repeated the reasons hereinabove set forth. He was interviewed by an officer of the United States Army and, upon information and belief, the officer told him to return to his home. He could not understand the reason for this but he went home. Thereafter he returned to his home and several days later, an agent of the Federal Bureau of Investigation appeared at Peter's place of work and stated that he would arrest Peter the following morning. Thereupon, in order to avoid arrest and without any plan or prearrangement, petitioner fled from his home and later crossed the international border into Mexico on April 2, 1952. He remained in Mexico until October, 1953. At all times while he was in Mexico,

his family and, upon information and belief, the Federal Bureau of Investigation knew of his whereabouts. He reentered the United States at El Paso, Texas, in October, 1953, and was admitted upon presentation of his alien registration card No. A7482554.

X.

He then obtained a Mexican tourist visa from the Mexican Consulate at Los Angeles, California on October 19, 1953 and departed from the United States to Mexico in November, 1953 for the purpose of gathering his belongings which he had left in Mexico. He remained in Mexico for two weeks and returned to the United States via El Paso, Texas in November, 1953. He was again admitted to the United States upon presentation of his alien registration card. He reentered the United States for the purpose of clearing himself and for the purpose of entering one of the armed services of the United States. Upon returning to the United States, he went to the home of his parents where he remained until apprehended by a member of the Federal Bureau of Investigation in February, 1954. On March 3, 1954, a warrant of arrest was served on him charging him with violation of Section 241 (a) (1) of the Immigration and Nationality Act in that at the time of entering the United States he was within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit: aliens who are immigrants not in possession of a valid unexpired immigrant visa, re-entry permit, border crossing identification card, or

other valid entry document, and not exempted from possession thereof by said act or regulations made thereunder under Section 212 (a) (20) of the Act and Section 241 (a) (1) of the Immigration and Nationality Act in that at the time of entry he was within one or more of the classes of aliens excludable by law existing at the time of such entry, to wit: aliens who are persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time or war or a period declared by the President to be a national emergency under Section 212 (a) (22) of the Act. That petitioner was detained under authority of said warrant and was released from custody on or about March 3, 1954 on posting of a recognizance bond in the sum of \$1,000.00. That he is now and ever since the date of his release has been free on said recognizance bond.

XI.

That subsequent thereto and on April 9, 1954, proceedings in deportation were held before respondent, Joseph A. Dummel, Special Inquiry Officer, who thereafter on June 7, 1954 rendered his written decision in which he determined:

(1) That the respondent is an alien, a native and citizen of Romania;

(2) That the respondent was admitted to the United States for permanent residence at New York, New York, May 27, 1950 upon presentation of a Nonpreference Quota Immigration Visa;

(3) That the respondent last entered the United

States at El Paso, Texas during November, 1953, and was admitted upon presentation of Alien Registration Card No. A7 482 554;

(4) That the respondent was registered for military service in the United States under the Selective Service Act of 1948, during August, 1950, and was classified 1A on January 4, 1951;

(5) That the respondent was called for induction into the military forces of the United States in March, 1952, but refused to be inducted unless he was first made a citizen of the United States;

(6) That the respondent departed from the United States on April 2, 1952 to Mexico, where he remained for approximately 18 months, for the purpose of avoiding or evading military training and service in the armed forces of the United States;

(7) That the respondent entered the United States at El Paso, Texas during November, 1953 for the purpose of resuming residence;

(8) That the alien registration card presented by the respondent at the time of his entry and admission to the United States at El Paso, Texas during November, 1953 was not valid for his admission to the United States as a returning resident.

XII.

That said Special Inquiry Officer further determined under the basis of the foregoing findings of fact:

(1) That under Section 241 (a) (1) of the Immigration and Nationality Act, the respondent is

subject to deportation, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: aliens who are immigrants not in possession of a valid unexpired visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the possession thereof by said Act or regulations made thereunder, under Section 212 (a) (20) of the Act;

(2) That under Section 241 (a) (1) of the Immigration and Nationality Act, respondent is subject to deportation, in that, at the time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: aliens who are persons who have departed from, or who have remained outside of the United States to avoid or evade training or service in the armed forces of the United States in time of war, or a period declared by the president to be a national emergency under Section 212 (a) (22) of the Act.

XIII.

That said Special Inquiry Officer further ordered:

Order: It is ordered that the alien be granted voluntary departure at his own expense in lieu of deportation within such period of time or authorized extensions thereof, and under such conditions as the District Director or Officer in Charge having administrative jurisdiction of the office in which the case is pending shall direct.

It is further ordered that if the alien fails to

depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the alien deported from the United States in the manner provided by law under charges contained in the warrant of arrest.

XIV.

That said Special Inquiry Officer did err as a matter of law in his determination in finding that petitioner violated Sections 241 (a) (1), et seq. of the Immigration and Nationality Act by reason of the facts hereinabove set forth at length in the previous paragraphs of this petition and by reason of the fact that at no time was petitioner represented by counsel prior to the deportation proceedings held before the Special Inquiry Officer. Further, that petitioner at no time knew the nature of the charges made against him. For the further reason that petitioner was not permitted to sign a waiver of the requirement to serve in the military forces as provided by Title 50, Appendix Section 454, as hereinabove set forth. That petitioner was entrapped, goaded and harassed into fleeing from the jurisdiction of this court by the actions of the United States Government, its agents, servants and employees, particularly in view of the fact that he was present in the draft board reporting for induction and could have been restrained at said time; that the findings of said Special Inquiry Officer are absolutely without foundation and contrary to the uncontradicted evidence in the case.

XV.

Petitioner did perfect his appeal to the Immigration Board of Appeals of said Immigration and Naturalization Service in Washington, D. C., and said Board did, on the 29th of November, 1954, affirm the order of deportation of said Special Inquiry Officer with the right of voluntary departure.

XVI.

That pursuant to the provisions of law, petitioner did, on or about March 12, 1955, file his petition to reopen and reconsider the decision of the Special Inquiry Officer dated June 7, 1954 and for further relief as provided in said petition. That said petition was filed pursuant to the provisions of Section 811, C. F. R.

XVII.

That as part of said petition, your petitioner did respectfully request that the deportation order be suspended on the ground of hardship based upon the fact of his marriage and that all his family was present in the United States.

XVIII.

That said petition further recites as grounds for reopening that the said Special Inquiry Officer erred in his decision which determined that petitioner be deported for the reasons hereinabove set forth at length.

XIX.

That on March 14, 1955, your petitioner was advised on behalf of the Acting District Director of

Immigration at Los Angeles as follows:

Your motion to reopen and reconsider the above case has been forwarded to the Board of Immigration Appeals. This office does not propose to stay enforcement of the outstanding order pending decision on the motion and the Board has been so informed.

It is noted that our letter of December 9, 1954 required this alien to appear personally at Room 222 on or before March 10, 1955 to present a valid travel document and a reservation for transportation if he wished to avail himself of the voluntary departure privilege. This he has failed to do. Unless such evidence is presented within the very near future it will be necessary to invoke the deportation provision of the order in this case and proceed accordingly.

XX.

That the Special Inquiry Officer was not qualified to hold said deportation hearing in that he was not appointed pursuant to the provisions of the Administrative Procedure Act (5 U.S.C. 1001, et seq.).

XXI.

That the Order of deportation of said Special Inquiry Officer is void as being in violation of law, specifically the Administrative Procedure Act (Section 5, U.S.C., 1001, et seq.).

XII.

That said Immigration and Naturalization Service intends to and will, unless restrained by this court, deport your petitioner from the United

States pending a determination of the Board of Immigration Appeals of his petition to reopen and reconsider, which is predicated upon the reasons hereinabove set forth. That the deportation of your petitioner from the United States, pending a determination of this petition, and of his petition to the Board of Immigration Appeals, under the provisions of law, will deny petitioner herein due process of law in that his deportation will be effected prior to a determination of his eligibility for relief under the provisions of law.

Wherefore, petitioner prays for judgment:

1. Declaring that the deportation hearing was unfair, null and void, and not supported by substantial, probative evidence.
2. Declaring that the order granting voluntary departure in lieu of deportation was null and void.
3. Declaring that the petitioner is not subject to deportation under the hearing afforded him by said Special Inquiry Officer.
4. Restraining the respondents from taking petitioner into custody and deporting him.
5. Granting such other and further relief as may be just and appropriate.

GROSS AND SVENSON,

/s/ By H. J. GROSS,

Attorneys for Petitioner

Duly Verified.

[Endorsed]: Filed October 19, 1955.

[Title of District Court and Cause.]

ANSWER TO PETITION

The respondents above named, by and through the undersigned, in answer to the Petition for Judicial Review, Declaratory Judgment and Injunctive Relief, on file herein, admit, deny, and allege as follows:

I.

Neither admit nor deny the allegations contained in Paragraph I, on the grounds that said allegations are conclusions of law.

II.

Admit the allegations contained in Paragraph II, except that respondents deny that Albert Del Guercio named in said Paragraph is the Acting District Director of Immigration and Naturalization at Los Angeles, California. Instead respondents allege that respondent, Albert Del Guercio, is Officer in Charge, Immigration and Naturalization Service, Los Angeles, California.

III.

Admit the allegations contained in Paragraph III.

IV.

Admit the allegations contained in the third sentence of Paragraph IV. Except as expressly admitted herein, respondents have no knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in

Paragraph IV, and on that ground, deny said allegations.

V.

Respondents have no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V, and on that ground, deny each and every allegation contained in said Paragraph.

VI.

Admit the allegations contained in Paragraph VI, except that portion alleging that petitioner left immediately for California where he lived with his parents as caretakers on a ranch in Thousand Oaks, California. As to the excepted portion, respondents have no knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and on that ground, deny said allegations.

VII.

Admit the first sentence contained in Paragraph VII. Except as expressly admitted herein, respondents have no knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph VII, and on that ground, deny said allegations.

VIII.

Neither admit nor deny the allegations contained in Paragraph VIII on the ground that said allegations are conclusions of law.

IX.

Admit that petitioner fled from his home and

later crossed the international border into Mexico on April 2, 1952; that he remained in Mexico until October, 1953; and respondents further admit the last sentence contained in Paragraph IX. Except as expressly admitted herein, respondents have no knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph IX, and on that ground, deny said allegations. Respondents further allege that petitioner departed from the United States to Mexico on April 2, 1952, where he remained for approximately eighteen months, for the purpose of avoiding or evading military training and service in the armed forces of the United States.

X.

Answering Paragraph X, respondents admit the first sentence contained in Paragraph X down to and including the date "November, 1953" on line 10. Respondents further admit the second, third, sixth, seventh and eighth sentences contained in Paragraph X. Except as expressly admitted herein, respondents have no knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph X, and on that ground, deny said remaining allegations.

XI.

Admit the allegations contained in Paragraphs XI, XII, XIII, XV, XVI, XVII, XVIII, and XIX.

XII.

Deny each and every allegation contained in Paragraphs XIV, XX, and XXI.

XIII.

Respondents deny each and every allegation contained in Paragraph XXII and further allege that on April 1, 1955, the Board of Immigration Appeals denied the Petition to Reopen and Reconsider referred to in said Paragraph. Respondents also allege that they will take no action to deport petitioner from the United States until the within judicial proceedings are terminated.

For a further, separate, and first affirmative defense to said petition, respondents allege:

I.

The petitioner has been accorded a full and fair hearing in conformity with law to determine his right to be and remain in the United States. There will be offered in evidence when this matter comes on for trial a certified record of the Immigration and Naturalization Service, Department of Justice, relating to the petitioner herein, containing the complete record of the deportation proceedings before the Immigration and Naturalization Service.

For a further, separate, and second affirmative defense to said petition, respondents allege:

I.

The Petition for Judicial Review, Declaratory Judgment and Injunctive Relief on file herein fails to state a claim upon which relief can be granted.

Wherefore, respondents pray for a judgment dismissing said Petition, denying the relief prayed

for therein, and for such other relief as to the Court seems just and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division

/s/ JAMES R. DOOLEY,
Assistant U. S. Attorney
Attorneys for Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 9, 1955.

In the United States District Court for the South-
ern District of California, Central Division

No. 18907-WB Civil

PETER HOLZ, also known as PETER HOLZ-
MULLER, Petitioner,

vs.

ALBERT DEL GUERCIO, Acting District Direc-
tor of Immigration and Naturalization at Los
Angeles, California, and JOSEPH A. DUM-
MEL, Special Inquiry Officer, Immigration
Service at Los Angeles, Respondents.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND JUDGMENT

The above entitled matter having come on for

trial on July 31, 1956 in the above entitled Court before the Hon. William M. Bryne, Judge presiding without a jury; the petitioner being represented by his attorneys, Gross and Svenson by H. J. Gross, and the respondents being represented by their attorneys, Laughlin E. Waters, United States Attorney, Max F. Deutz and James R. Dooley, Assistant U. S. Attorneys by James R. Dooley, and counsel for the parties hereto having stipulated that an authenticated record of deportation proceedings relating to the petitioner should be received in evidence, and the Court having received the same; and the Court having heard the arguments of counsel, and having taken the within cause under submission; and the Court having reviewed the aforementioned record of deportation proceedings relating to the petitioner, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Petitioner is an alien, a native and citizen of Rumania. He last entered the United States during November, 1953.

II.

On March 3, 1953 a warrant of arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging that the petitioner was subject to deportation on the following charges:

"Sec. 241(a)(1) of the Immigration and National-

ity Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit: aliens who are immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document and not exempted from the possession thereof by said Act or regulations made thereunder, under sec. 212(a)(20) of the Act."

"Sec. 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry he was within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens who are persons who have departed from or have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency under sec. 212(a)(22) of the Act."

III.

Pursuant to said warrant of arrest, a deportation hearing was held at Los Angeles, California, on April 9, 1954; and on June 7, 1954, the Special Inquiry Officer who presided at this hearing rendered his decision, ordering that the petitioner be granted voluntary departure, but that if petitioner failed to depart when and as required, the privilege of voluntary departure should be withdrawn without further notice or proceedings and the petitioner deported from the United States in the manner provided by law under the charges contained in the warrant of arrest.

IV.

On June 17, 1954 an appeal was taken by the petitioner from the decision of the Special Inquiry Officer; and on November 29, 1954, the Board of Immigration Appeals rendered its decision, dismissing plaintiff's appeal.

V.

Thereafter, the petitioner filed a Petition to Reopen and Reconsider the Order of the Special Inquiry Officer entered on June 7, 1954; and on April 1, 1955 this Petition was denied by the Board of Immigration Appeals.

VI.

There is reasonable, substantial and probative evidence to support the decision of deportability and the order of deportation outstanding against the petitioner.

VII.

The officials who acted in connection with the deportation proceedings relating to petitioner had jurisdiction and authority to act.

VIII.

The deportation proceedings relating to the petitioner were fair, were in accordance with law, and did not contravene any of petitioner's constitutional rights.

Conclusions of Law

I.

This Court has jurisdiction of the within cause under the provisions of Section 10 of the Act of

June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U.S.C.A. §1009.

II.

There is reasonable, substantial and probative evidence to support the decision of deportability and the order of deportation outstanding against the petitioner.

III.

The officials who acted in connection with the deportation proceedings relating to petitioner had jurisdiction and authority to act.

IV.

The deportation proceedings relating to the petitioner were in accordance with law, and did not contravene any of petitioner's constitutional rights.

V.

The order of deportation outstanding against the petitioner is valid, and petitioner is deportable pursuant to said order.

VI.

Judgment should be entered in favor of the respondents and against the petitioner, denying the relief prayed for in petitioner's Complaint and awarding to the respondents their costs and disbursements.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It is Ordered, Adjudged and Decreed:

1. That judgment be, and the same is hereby

entered in favor of the respondents and against the petitioner, denying the relief prayed for in petitioner's Complaint entitled "Petition for Judicial Review, Declaratory Judgment and Injunctive Relief".

2. That the respondents have their costs incurred herein, taxed at \$20.00.

Dated: This 4th day of September, 1956.

/s/ WM. M. BYRNE,

Judge, U. S. District Court

Affidavit of Service by Mail attached.

[Endorsed]: Lodged August 20, 1956. Entered and Filed September 4, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, Peter Holz, also known as Peter Holz-Muller, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Judgment given, made and entered in the above entitled action in favor of the Respondents herein and against the Petitioner herein, and from the whole and every part of said judgment.

Dated: October 16, 1956.

GROSS AND SVENSON,

/s/ By H. J. GROSS,

Attorneys for Petitioner

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 26, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Petitioner-Appellant will rely on appeal are:

I.

The court erred in giving judgment for the Respondents.

II.

The court erred in finding that there was reasonable, substantial and probative evidence to support the decision of deportability and the order of deportation outstanding against the petitioner.

III.

The court erred in finding that the officials who acted in connection with the deportation proceedings relating to petitioner had jurisdiction and authority to act.

IV.

The court erred in finding that the deportation proceedings relating to the petitioner were fair, were in accordance with law, and did not contravene any of petitioner's constitutional rights.

V.

The court erred in concluding that there was reasonable, substantial and probative evidence to support the decision of deportability and the order of deportation outstanding against the petitioner.

VI.

The court erred in concluding that the officials

who acted in connection with the deportation proceedings relating to petitioner had jurisdiction and authority to act.

VII.

The court erred in concluding that the deportation proceedings relating to the petitioner were in accordance with law and did not contravene any of petitioner's constitutional rights and that the order of deportation outstanding against the petitioner is valid, and that petitioner is deportable pursuant to said order.

VIII.

The court erred in not submitting the matter upon the authenticated record of deportation proceedings held before Joseph A. Dummel, Special Inquiry Officer of the Immigration Service at Los Angeles and in not hearing the within petition de novo.

IX.

The evidence was insufficient to support the verdict and judgment in favor of the Respondents.

Dated: October 31st, 1956.

GROSS AND SVENSON,

/s/ By H. J. GROSS,

Attorneys for Petitioner-Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 14, 1956.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) of Federal Rules of Civil Procedure, the Petitioner-Appellant hereby designates for inclusion on the record on appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed October 26, 1956 the following in this case to be included in the record on appeal:

I.

Petition for Judicial Review, Declaratory Judgment and Injunctive Relief.

II.

Answer to Petition.

III.

Findings of Fact and Conclusions of Law.

IV.

Judgment.

V.

Exhibit offered by Respondents, consisting of the authenticated record of Deportation Proceedings relating to the Petitioner, received in evidence pursuant to stipulation.

VI.

All statements of the court and counsel made and reported at the time of the argument of the matter before the court on July 31, 1956.

VII.

Statement of Points on Appeal.

VIII.

This Designation of Record.

Dated: October 31st, 1956.

GROSS AND SVENSON,

/s/ By H. J. GROSS,

Attorneys for Petitioner and
Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 14, 1956.

[Title of District Court and Cause.]

AFFIDAVIT AND ORDER EXTENDING
TIME FOR PREPARATION AND FILING
REPORTER'S TRANSCRIPT ON APPEAL
AND FOR DOCKETING RECORD ON AP-
PEAL

Whereas, the petitioner Peter Holz, also known as Peter Holz-Muller, has appealed from the judgment made and entered in the above entitled action to the United States Court of Appeals for the Ninth Circuit, and

Whereas, the official reporter, Thomas B. Goodwill, has been extremely busy and has been and will be unable to complete the reporter's transcript or any record on appeal in the above entitled action within the initial time prescribed by Rule 73 (g)

of Federal Rules of Civil Procedure and that it is necessary and imperative that the time so fixed be extended by an order of the above entitled court, as provided in said Rule, to and including January 23, 1957,

Now, therefore, by reason of the facts and circumstances above stated, petitioner prays that the above entitled court may enter its ex parte order, pursuant to Rule 73 (g) of Federal Rules of Civil Procedure, extending the time to file the record on appeal and docket said appeal to and including January 23, 1957.

Dated: December 3, 1956.

/s/ H. J. GROSS,

Attorney for Petitioner-Appellant.

AFFIDAVIT IN SUPPORT OF MOTION FOR EXTENSION

State of California

County of Los Angeles—ss.

H. J. Gross, being first duly sworn, deposes and says:

That he is the attorney for the petitioner-appellant herein; that he has been advised by the office of the clerk of the District Court that it will be impossible for the official reporter to complete the record on appeal within the time prescribed by law.

Wherefore, affiant respectfully prays that the court make its ex parte order extending the time

within which the record on appeal may be filed and docketed to January 23, 1957.

/s/ H. J. GROSS

Subscribed and sworn to before me this 3rd day of December, 1956.

[Seal] PATRICIA ARKIN,
Notary Public in and for said County and State.

ORDER

Upon reading the foregoing affidavit and preamble, and good cause appearing therefor, it is hereby ordered that the time for filing the record on appeal and docketing the appeal in the above entitled action may be and is hereby extended to and including January 23, 1957, pursuant to Rule 73 (g) of Federal Rules of Civil Procedure.

Dated: December 5, 1956.

/s/ WM. M. BYRNE,
Judge

[Endorsed]: Filed December 5, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 38, inclusive, containing the original

Petition;

Answer;

Findings of Fact, Conclusions of Law and Judgment;

Notice of Appeal;

Statement of Points on Appeal;

Designation of Contents of Record on Appeal;

Affidavit and Order Thereon Extending Time for Docketing Record on Appeal;

B. One volume of Reporter's Official Transcript of proceedings had on July 31, 1956;

C. Defendant's Exhibit A.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 17th day of January, 1957.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

No. 18907-WB—Civil

vs.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances: Attorneys for Petitioner: Gross and
Svenson, By: Harry J. Gross, 14545 Sylvan Street,
Van Nuys, California; Attorneys for Respondents:
Laughlin E. Waters, United States Attorney, Max
F. Deutz, Assistant United States Attorney, Chief
of Civil Division, James R. Dooley, Assistant
United States Attorney, by James R. Dooley, Assist-
ant United States Attorney, 600 Federal Building,
312 North Spring Street, Los Angeles 12, Calif. [2*]

The Clerk: No. 18907-WB Civil, Peter Holz, also known as Peter Holz-Muller, vs. Albert Del Guercio et al., for Court trial.

Mr. Dooley: Ready for the respondents, your Honor.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Gross: H. J. Gross, of Gross and Svenson, for the petitioner.

The Court: You may proceed.

Mr. Dooley: Your Honor, Counsel for the plaintiff and for the defendants have stipulated that a certified copy of the records of the Immigration and Naturalization Service relating to Peter Holz, File No. A7 482 554, might be received in evidence, and I would request, your Honor, that it be marked as a defendants' exhibit so that it can be withdrawn by the defendants.

Mr. Gross: It is so stipulated.

The Court: Very well. It will be received and marked Defendants' Exhibit A.

(Said file was received in evidence and marked as Defendants' Exhibit A.)

The Court: Do both sides rest?

Mr. Gross: May I address the Court on this subject of resting, for just a minute. Perhaps this [3] would be more in the nature of argument, but coming into this thing as we did after the preliminary hearing, and not speaking now about the U. S. Attorney's office, but ourselves, we appeared at the hearing, I want the record to indicate that, I had hoped originally that we could have a hearing de novo under the Landon Case, because as I understand the law now, there must be a clear and convincing record to uphold the decision of the Administrative tribunal. However, most of my remarks are going to be argument on that record. Having said that, I have nothing further to say at this time.

The Court: Well, it is like any other lawsuit except, of course, this is a judicial review. After you have presented what evidence there is to present, and you have presented here the record and both sides rest, then you may argue it, if you care to.

Now, of course, it isn't a trial de novo and may not be tried as a trial de novo.

However, at times there may possibly be some evidence and I always ask counsel if they rest. As an illustration, it may be that the petitioner was not permitted to cross examine a witness at the hearing, let us say, and he can testify to that here.

When we say there may not be a trial de novo, that means there may not be a trial going to the merits of the action here, on the question of whether or not he is deportable. [4] But in a judicial review, the thing the Court reviews is, first, whether there was reasonable, substantial, and probative evidence to support the finding of the Hearing Officer, and whether he had a fair hearing, so the Court doesn't determine the question that was determined at the hearing, de novo.

But, as an illustration, it might be that he would say that he asked if he could have an attorney and they told him he wasn't permitted to have an attorney. Then he could testify to that. That is what I mean, when I say it is possible that there might be other evidence, but this Court doesn't try the question that was tried at the hearing. The Court just reviews it like a Court of Appeals reviews it. That is the Court's position, to review.

So, if you both rest at this time, you may proceed with your argument.

Mr. Gross: Well, I will rest, your Honor.

Mr. Dooley: The respondents rest, your Honor.

The Court: All right. You may proceed with your argument.

Mr. Gross: I do not know whether the Court has examined the file.

The Court: I have examined the file, although neither party has filed a trial memorandum. In the future, we will have pre-trials on these. [5]

Mr. Gross: That, frankly speaking, is what we have been expecting. I am not using this as a crutch, as your Honor knows from my appearances before you, I try not to be technical and try to follow the rules, but I was under the impression that we would have this pre-trial, and it was called up. I am ready. I don't want to say I am not. But John Garvin came in last week. We had this week to get ready on it.

The Court: Ordinarily there isn't much to be had at pre-trial, unless there are unusual questions, and the Court then has a pre-trial memorandum and ordinarily in these matters we have trial memorandums, but there is no trial memorandum here in this case. However, it isn't necessary.

You may proceed with your argument.

Mr. Gross: I did not want to belabor the Court with the entire record.

Now, in this particular case, we were called in about nine days prior to the hearing, the formal

hearing before Mr. Dummel, who was the Hearing Officer for the Department of Immigration. All prior proceedings were had before Counsel came into the picture.

I wish to tell the Court this is the kind of a case that you don't touch without feeling, but we feel rather strongly about it. It is perhaps like representing people who may be Communists or something; you examine it and you have to get a [6] feeling about it.

In this particular case, we are in a situation where Gross and Svenson find a man who is charged with refusing to serve or leaving this country for the purpose of evading military service.

You will find in the record a rather complete medical examination from a Dr. Louise J. Gordy.

Peter Holz, at the time of this alleged act, was twenty years old. He was born in Romania. Mr. Holz is in the Courtroom. Some people at twenty are rather mature. Some are young. Mr. Holz, will you stand up.

(The petitioner rises in the Courtroom.)

Mr. Gross: This is Mr. Holz. Thank you.

Mr. Holz was born in 1931 and spent his boyhood running between the Germans, the Russians, and the Romanians, on account of the war, and after the war he came to the United States and couldn't speak English very well, and no sooner did he get here as a displaced person when he was ordered into military service.

His experience at the time led him into a number of things which perhaps shouldn't have been

done. I don't believe for one moment that, as suggested by the record, he left the United States to escape military service. I think Peter Holz was escaping from everybody and everything. He had seen conscription in Russia and in Germany of the [7] same people, in both armies, and when Peter Holz left the United States, it was after a threat from the Department of Justice that if he did not appear for induction he would be arrested.

I think we have to visualize a young man who doesn't speak English very well. He comes into the United States through the offices of his church and through our functions on which we are brought up here, and then he goes through the same things that he escaped from. His early life was a rather interesting thing. I ask your Honor to look at it.

I try to put myself in the position of what I would do if the situation were reversed.

Now, in this particular case, this young boy who came here as our ward had a right, and that right is this, that if he wanted to, all he had to do was to give up his right to becoming a citizen and he could stand Pat and he did not have to serve in the military service. Your Honor, I submit to you that that is the law. All he would have to do is tell the draft board, "Well, I have made an application for my first papers," so-called. As we understand, that is nothing at the present time, and he would be permitted to stay here and he could not be forced into the military service or drafted, and while he might not be admired from my standpoint, if that were the case, I probably wouldn't be here today. But,

instead he was never offered this opportunity. He met with an overzealous draft board. Now, that is the part that [8] is not in the record. That is the part that is so important here.

He knew something about this. He tried to communicate this to the draft board, and he met an overzealous draft board. He felt perhaps that American boys so-called were in there fighting and he should be, too, particularly since he was in this country as a ward, since he had been picked up and brought here. He was never given this opportunity, and from that point on there were a series of harassments of this young man, and there must have been a dozen incidents here, finally culminating with where he picks up and he goes to Mexico.

You will find in the record where the Hearing Officer asks him:

“Well, you went to Mexico to avoid serving in the army?”

That is not a direct quote. It doesn't purport to be.

And he answers, “Yes.”

I think you will find other evidence in there, as far as we were permitted to bring it out, that he was in the Induction Center. Now, that is the important thing, your Honor. All they had to do at the time was to keep him there, but they permitted him to go home and to think it over. As a commander in the Judge Advocate General's office, I find this difficult to understand. If we had someone delivered or received there for induction and he was a little unhappy about getting into [9] the

Navy, I submit, your Honor, his unhappiness would continue right where he was. Now, the record will indicate that he was there. He said he didn't want to serve, he wanted to become a citizen so that if he were sent to Germany and picked up by the Russians, he would not be shot. He had seen that occur over there and there is no denial on this record that he would not be shot as a Russian serving in the enemy forces.

He had no citizenship. He had no counsel. Now, that must be something!

So, instead of saying, "Look, you are in here, whatever rights you had you waived, you did not assert your right at a time when you could have," they said, "You got to go home and think about it."

And there is something else in the record. Then he received a visit from the FBI and he was told that if he did not report the following morning, he would be arrested. I think we better relate to the Court, there is something in there, and at that point he fled.

Now, to recapitulate my argument, the reason that we are interested in this thing is that although I very strongly feel that anybody who was brought here under the conditions that he was brought here should be grateful and should be the first one in it, I do feel that we should give him a fair shake in the way we do things.

Now, right there is where he got some very "fancy" advice, [10] probably from his family. He felt himself hemmed in on all sides, and there was a letter written to the draft board or to the Depart-

ment of Immigration saying that he intended to return to Germany, anyhow. Your Honor will find that letter in there. That letter and this statement in answer to a direct question by the Hearing Officer that he left the United States to avoid fighting are the only things in this record which will support the finding of the Administrator.

I make that reference to that letter for this reason, that it was an act of despair and desperation of a boy who did not know where he was going. He was at the crest of a perplexing point.

If he had come to me and if I had represented him at the time, I would have told him, "All you have to do is not claim citizenship and refuse to serve, and that is the end of this thing, and just that, and do not go across the line." But instead of that, this was never made clear to the boy. He never received an opportunity in this.

And from that point on, there was a period of a year and a half of harassment, the like of which I haven't seen for a long time.

Now, you might say, "Well, he should serve." That is probably the point under consideration.

The point is, I don't think he for one minute recognized what his rights were, and I don't think for one minute if he [11] had recognized his rights, he would have made this terror-stricken run over the border to Mexico, particularly since he was in contact with his family all the time, writing back and forth, and when the FBI came to find out where this "fugitive" was, his mother and father, and the record I think bears this out, supplied his address.

They knew where he was. He wasn't in any sense running away. Well, I guess he was—he was hiding from a terror he could not understand.

Now, I have had my say. I want your Honor to see the record, not to feel the way I do about it, but to see why I am here.

There has been some suggestion that these proceedings were brought for purposes of delay, and I concede that they are in some cases. This thing is not conceived for delay and I wouldn't be down here for delay.

I think there has been a miscarriage of justice in this case, your Honor, and that is why we are here.

Thank you very much.

Mr. Dooley: At the outset, I would like to mention to the Court that there are two charges that are contained in the warrant of arrest rather than one. The first charge is that the plaintiff, at the time that he entered the United States in 1953, did not have a proper entry document such as a visa or a passport and therefore he was ineligible to enter the United States; and the second charge is that he was ineligible [12] to enter the United States because he had departed from the United States to avoid training and service in the armed forces during time of war or during emergency. I believe it is well to keep both charges in mind because either charge is sufficient to sustain the Order for Deportation.

The Court: His time of departure, when was that, during the Korean War?

Mr. Dooley: It was during the Korean conflict.

I think the Court will take judicial notice that the Korean conflict commenced June of 1950 and continued, I believe, until about July of 1953, the hostilities, and as I understand it, a state of emergency was declared by the President on December 16, 1950, and continued and probably it is even still in effect, I am not sure, but it was in effect throughout the alien's stay in Mexico. So, the dates are probably rather important there.

Plaintiff departed on April 2, 1952. The record is undisputed that he remained in Mexico continuously from April 2 until about October of 1953, a period of approximately eighteen months.

Now, the regulations provide that an alien who has been admitted to the United States for permanent residence is excused from having a visa when he goes to a place like Mexico only if he remains there for six months or less. The regulation is quoted in the decision of the Board of [13] Immigration Appeals in detail.

Now, the plaintiff having remained in Mexico for approximately eighteen months, was required to obtain a visa before returning to the United States. It is admitted that he did not have this visa when he came back to the United States; therefore, when he entered in October of 1953, and incidentally, he went back to Mexico for a short period in November and came back again in November of 1953, at the time of his entry in October of 1953, he was without the proper entry documents and therefore his entry was illegal.

And on the first ground, there would seem to be

no dispute as to his deportability. Clearly there is reasonable, substantial and probative evidence, if not conclusive evidence, that he is illegally in the United States, on the first charge of the warrant of arrest.

Now, in the record, in the motion made by plaintiff to the Board of Immigration Appeals, appeal by plaintiff to the Board of Immigration Appeals, it is suggested that the plaintiff didn't know that he was required to have a visa and that he had gone to the Consulate Officials and that they had misinformed him as to what he was required to have. It is submitted that even if the plaintiff assumed that he was given misinformation as to the documents that he was required to have, it should not operate as an estoppel against the Government to permit him to enter the United States without [14] the proper entry documents. Now, that would seem to cover the first ground of deportation.

Now, the second ground as I mentioned was that he had previously departed from the United States in order to avoid military service during time of war. Now, on that ground it is interesting to note the chronology of events. Going back until the time that he first arrived in the United States from Germany in 1950, he was admitted to the United States on May 27, 1950, for permanent residence.

On August 7, 1950, he registered for the draft.

On December 18, 1950, he obtained a Declaration of Intention which indicated his desire to acquire United States citizenship. At that time he evidently intended to acquire United States citizenship.

On March 4, 1953, he received a notice from the local draft board ordering him to report for induction.

And on March 7, 1952, he wrote a letter, at least a letter was received at the Immigration and Naturalization Service, Washington, D. C., in which the plaintiff returned his Declaration of Intention. When returning his Declaration of Intention he states as follows:

"Enclosed please find my 1st. Paper, I am sending back to your office.

"The reason is, I have a Legacy in Germany and I would not be able to take out the Legacy of Germany, if I am an [15] American Citizen. After settling this matter, I would like to apply in future time for the 1st. Paper again."

It would seem rather significant that immediately after having been ordered to report for induction he decided that he did not wish to acquire American citizenship.

Then, on April 2, 1952, he departed from the United States.

It is shown in the file, from the petitioner's own admissions, that he departed from the United States in order to avoid service in the armed forces.

Exhibit 2 attached to the record is a statement made by petitioner before the Immigration and Naturalization Service, and on page 3 of this statement are the following questions and answers:

"Question. Had you been ordered to report for induction into the Armed Forces of the United

States prior to your departure to Mexico on April 2, 1952?

“Answer. It was much before that, about 14 days before that I was ordered to report for induction, and I did report. I went down to Washington Boulevard on the day they ordered me to come, but I didn’t go in the Army. I told them why and everything. They said I should go home and go back to work. And one morning the FBI man came and asked me if I understood, and told me that they were going to arrest me the next day. That [16] is when I left.

“Question. Then when you departed from the United States on April 2, 1952, at El Paso, Texas, did you depart for the purpose of avoiding service in the Armed Forces of the United States?

“Answer. Well, yes, I did.

“Question. Did you have any other reason for departing from the United States on April 2, 1952?

“Answer. No. I didn’t know anyone in Mexico or have any job, and I didn’t have any other reason to go there. I was scared, that’s all.”

Now, from the petitioner’s own admissions, we have reasonable, substantial, and probative evidence that he departed for the purpose of avoiding military service.

Now, Counsel for the plaintiff has mentioned the fact that at the time petitioner went to the draft board he demanded that he be made a citizen prior to being drafted into the Army. Of course, it is submitted that he had no right to impose such a condition precedent to his being subjected to the draft.

But, his demand for citizenship at that particular time before being inducted is inconsistent with his action in returning the Declaration of Intention to the Immigration and Naturalization Service stating that he did not want American citizenship because he had a legacy in Germany which he would not be able to acquire with American [17] citizenship.

Now, counsel for the plaintiff has also mentioned the hardships that the plaintiff endured during his youth and referred to the doctor's report. It is significant that in the doctor's report, which is marked as Exhibit No. 4, most of this report is obviously on what the petitioner told the doctor, who was a psychiatrist, concerning his prior hardships. Since at that time deportation proceedings had already been commenced, the rule that he passed going to a physician after the commencement of litigation and giving subjective symptoms is probably not entitled to much weight. Of course, being an Administrative Proceeding, this document wouldn't be admissible.

But the most significant portion of this medical report appears on the last page, in the last paragraph, which reads as follows:

"From the psychiatric standpoint, there is no evidence in the examination of any mental enfeeblement or psychosis. He is intelligent, but still has difficulty with the language. He is neatly dressed, quiet in manner, not voluble, and exhibited no emotional outbursts or exaggerated emotional responses in telling his story. He expressed only a minimum of self-pity and made no bid for sympathy because

of his childhood war experiences, although it is apparent they left an indelible [18] impression on him. He is not depressed but is very much discouraged at this time. There is no evidence of any constitutional psychopathy or psychopathic personality.”

I did not complete reading the last paragraph.

From a medical standpoint, I believe that the last paragraph states that at the time of the examination at least he was suffering from no psychopathic neurotic condition, and certainly the remainder of the report is merely a recitation of the history of his past life, which evidently the petitioner told the doctor.

In view of these facts, it is submitted that there is reasonable, substantial, and probative evidence to support both the charges contained in the warrant of arrest and the Order of Deportation.

Mr. Gross: May I reply, your Honor?

The Court: Yes.

Mr. Gross: The U. S. Attorney has spoken of Dr. Gordy's report. As I heard him read it, I found some comfort in that, your Honor, he is not mentally diseased, he is not psychotic, and he is not a neurotic. I don't think there is any question about his war time experiences. If it had not been for those, he wouldn't have been admitted as he was. These displaced people are brought here for the very reason that they have had these experiences. He had his between the ages of eight and eighteen or eight and fifteen, whatever it was. They were [19] rather gruesome. They are set out here. If he

were a psychotic or a neurotic or if he were mentally diseased, he wouldn't be here. That is No. 1.

No. 2: Your Honor, at this hearing, they asked him, "Did you leave the country for the purpose of evading service?" Now, at that time he was represented by counsel, by us. I think you know far better than I do that when a man comes into an office and he speaks to his attorney, his attorney questions him at length and then points out to him the position that he is in. Now, there has been no effort by our office or by anyone to suggest, "Well, this is the way you answer the question." But, here is a leading question taken out of context, saying, "Well, you left for the purpose of evading service?" Well, I think that is all right. I am not admitting that he did, but if they asked it in that manner, there was only one truthful answer unless he perjured himself, because he was frantic, and there isn't any dispute in the record that the FBI called at his house on a number of occasions.

The Court: I don't understand what you are arguing, Mr. Gross. If he didn't leave to avoid military service, what did he leave for?

Mr. Gross: I think that the record will indicate, because he was in contact with his family and he came back. He left to avoid a terror, not to avoid service. He was willing to serve. [20] .

The Court: Now, when you say he left for terror, if it was a case where he was down at the office of the military authorities and they talked to him and he got steamed up and went home, I can understand that, and after he got home and calmed down,

he decided he made an error, when he got frantic about this thing, and went back the next morning and apologized for his acts, and so forth, I can understand that, because of his background. It is clear from his background experience, he didn't want to go into the service. But, when he went away and stayed and lived a year and a half in a foreign country and endured the difficulties that a person would by going and living in a foreign country, where you say he had no friends, that terror didn't continue for a year and a half, and it shouldn't have if that is what the record says. I haven't read the record yet, but I am just going by what you are telling me and what Mr. Dooley has to say. It is difficult for me to understand that.

All I am stating is that it would be simple for me to understand how a young man, who was surrounded in quarters where there were military authorities, if he is going into service, gets to thinking of that, he gets panicky and he runs home and two or three or four or five hours later he realizes that was not the answer, that was a silly thing to do, and then he goes back the next day, but any time a person goes away for a year and a half, he does not remain panicky, [21] panic-stricken for a year and a half. So there was only one reason why he stayed down there and that was to avoid military service. He told the truth when he said that.

Mr. Gross: I hope your Honor isn't committed to that idea.

The Court: What is that?

Mr. Gross: I say, I hope your Honor isn't committed to that idea.

The Court: Now, that is the way it appears to me. Now, you tell me what other purpose there possibly could be. Do you mean he went down there for a year and a half, just cringing behind some door down there?

Mr. Gross: Quite to the contrary, your Honor. Not only was he not cringing behind a door there, but I think it is an accepted fact that at all times they knew where he was. I think you have to take the view that he misconstrued the situation in the light of his experience, your Honor.

The Court: Why did he stay there a year and a half? Tell me that. I don't want to argue with you, but if I can see your point when I read this record, it may be helpful. Why did he stay there a year and a half if it was not to keep out of the service, to keep from going over to Korea?

Mr. Gross: This is my point, he was up against something he didn't understand and this was the only way that he could handle that situation. You might say that he did this to [22] avoid military service, your Honor. Now, I am having difficulty getting the point across which is vital to me. He went into the induction office. He was in there. He appeared, now, this boy, by himself, without counsel. Now, I think I can represent to the Court we certainly did not represent him and as far as I have been able to find out, no one represented him, he had no legal advice at all. He went over there and said, "Well, this thing happened. I have seen

people shot. I have seen these massacres. I can't serve. I don't want to serve." He is there for induction, right at the station, so they said, "Well, go on home, think about it."

So one day he gets threatened with arrest and so he runs for cover.

If someone had given him advice, and this I would not appreciate if they had, but if someone had explained to him that he did not have to serve if he did not want to, if he gave up his cherished right of citizenship, that is one thing. But I think that in dealing with the United States Government, the Government has a right to expect a certain, I think someone called it a rectangular corner-cutting, you got to turn sharp turns in dealing with the Government, the Government thinking the way it should be, but the Government has to deal with us in that way, too.

The Court: I think I see your point now. In other words, it is that because of this experience that he had over in Europe, the terrible experience, he just did not want to [23] serve and it had a different effect on him than it has on the ordinary person, because of that experience, and he just couldn't accept that and because of the great effect on him, that caused him to flee. Is that your position? I might say this, in that respect, you understand I don't blame him for that. That could be true, that while he may have had such experience that even death might be preferable to him than putting on a uniform, so he couldn't be punished for not serving. But, on the other hand, our laws

are such that if he doesn't accept the responsibilities in this country, regardless of the reasons why, then, he cannot accept the benefits of this country. That is the purpose of our laws. So that doesn't alter the fact that he told the truth.

As a matter of fact, from what I get of the record here, he has been very truthful apparently. All through it seems quite clear to me and it fits right into what he said. I don't doubt but what when he went there he had a dread.

There are a great many American boys who don't want to serve. There are a great many American boys that don't want to put on a uniform, and there is just a limit as to how far they go, though, to keep out of the service. There aren't very many of them that go to strange countries or to Mexico and stay down there a year and a half and wait and sit the war out rather than serve. Now, perhaps he would not have gone that far if it wasn't for this experience that you [24] speak of that he had over there. It is true he had a dread of war and he had a dread of putting on that uniform. But that is neither here nor there. The point is that he didn't and there is no distinction made under our laws.

Mr. Gross: He had an experience here, too, your Honor. That is more important than his background.

The Court: All right. Well, I haven't read the record.

Mr. Gross: I haven't tried to set forth this record. It wouldn't be fair to your Honor who reads

it. Perhaps he knows something about court martials. There is a way of coercing people.

The Court: I don't know. I don't understand why you would say "coercing". If you are inferring that this Government coerced him, you made reference a few moments ago to the fact that he could avoid service by filing a form that would excuse him from service and relinquishing any right to ever become a citizen.

Mr. Gross: That is true.

The Court: Of the United States. Well, that is true, but assuming he had done that, it doesn't change his position. The only thing is, he is not being prosecuted here, no one is attempting to send him to jail. All the Government is attempting to do is to get him out of the United States, but now he has changed his mind, now that the war is over, he wants to stay here. He didn't want to stay here before. [25]

Mr. Gross: That is the way I feel in 99 $\frac{3}{4}$ percent of the cases, but I say this, your Honor: maybe you see my point and don't agree with me. This has happened many times, but my thought is this, when you see a series of events, your Honor, when a man tries to obtain citizenship which he is not entitled to because he is afraid, because if he went into the service, he was afraid if he were captured he would be shot, and that is what the record indicates, that if he then tries to go for his first papers and they won't let him have them, and they come to his home and say, "We are going to arrest" him, he finds

himself up against a Goliath he doesn't understand, that is the difficulty.

The Court: But, Mr. Gross, don't you see that this is simple. I don't like to get into an argument with you on this thing, but on the thing you are talking about, if what they did subjected him to criminal prosecution and you were standing before me now and I was to sentence him for a crime, I would see the merit in your argument.

You say here he was, he was willing to give up his right to citizenship, and so forth, and then they used this duress. Duress for what? They did not use any duress on him.

As far as he was concerned, if what resulted brought him before me today to be sentenced to prison, then, I would say there was merit to it, that if he was brought into that position today, he couldn't be sentenced to prison, but the [26] only question before me today is that he receives what he was seeking at that time. In other words, he didn't want to become a citizen of the United States, he didn't want to stay in this country if he had to go to war in Korea, so he left the country voluntarily, and you say it was because he was afraid. Well, whether he was afraid or not, nothing was going to happen to him. He left the country and he stayed away a year and a half until the war was over in Korea, and now he comes back here. He isn't coming back to be punished, and he isn't before me to be punished.

The only thing is, the Government now says in

effect, "You didn't want to be a citizen of the United States, you didn't want to fulfill the obligations of a citizen of the United States, nor did you want to fulfill the obligation of an alien admitted to this country for permanent residence, so you departed and stayed away for a year and a half, until the war was all over in Korea, and now you come back and you say, well, you would like to have what you gave up then." So this country hasn't put any onus on him. They haven't put any burden on him, nor have they used any duress as you term it. Duress for what? I fail to follow your reasoning at all.

Mr. Gross: Well, may I have one more minute and then I will remain silent.

Your Honor has taken one facet of my argument, this fact [27] that he fled—let us call it a flight, but the record is also replete—first of all, we are not allowed to have an exact copy of this record. I was shown the record. If they show you a paper there, you sign a paper. You couldn't make a copy of this and I didn't. That is the best we can do in these things. But this boy starts out by saying, "I want to be a citizen, I want to go in and so they won't feel I am a volunteer." There is more in the record about that, decidedly more than there is about this later thought, "Well, fine, I don't want to be a citizen." Your Honor has taken one part but not the other. All along the line, he says, "Make me a citizen and I will go in, because I don't want to be picked up as a Russian." After all, this particular part of Sudetanland that became Germany or Russian does not want a person to have the right to be

in the army. That is in the record. He wanted to have a right to serve.

The Court: What do you mean by having a right to be in the army? You don't suppose the United States Government would have him in the army if he didn't have a right to be in the army. You don't suppose the fact that if he was in the army here, he was inducted without a right to be in the army?

Mr. Gross: I think I should be the last person in the world to question that, but he had been in Germany and in Russia where both sides had impressed the citizens into the [28] army, and if one impressed in the army were recaptured by re-occupying forces, he was shot, the people impressed in the army were shot as being enemy camp followers.

The Court: How old was he at this time?

Mr. Gross: He was born in 1930, '30 or '31.

The Court: And this was '52?

Mr. Gross: '51-'52.

The Court: 22 years old.

Mr. Gross: Well, I gathered the inference on this thing, but he had twelve years of this, your Honor, from 1939, or even before that they had the occupation there.

I have had my say here. I think this boy doesn't know what we have here, but he had been indoctrinated in Russia and Germany. That is why he was here.

That is the way I feel about it.

The Court: Of course, this boy may feel now that he may have made a mistake, but one thing I am sure of, this boy knows why he spent that year and a half down there in Mexico, to escape military service or just because he was afraid he wouldn't get a fair deal up here in this country. He knows in his own conscience why he spent that year and a half down there.

It is unbelievable that an intelligent person would go to a foreign country and spend a year and a half—As I indicated a few moments ago, true, it could be, and I could [29] accept that he would run away from home in terror, overnight, because his mind was in a state of confusion, and perhaps come back the next day. I will say he would even run away, get in a car or on a train or on a bus and go down into Mexico and even go so far as to stay a couple of days down there, with his mind in a state of confusion, because he felt that he was not going to get a fair deal, he didn't know why, it was just terror, but he doesn't sit there for a year and a half for that reason.

Mr. Gross: Depending on the collosus he is fighting.

The Court: Well, all right. It will be taken under submission.

[Endorsed]: Filed Dec. 4, 1956.

[Endorsed]: No. 15414. United States Court of Appeals for the Ninth Circuit. Peter Holz, also known as Peter Holz-Muller, Appellant, vs. Albert Del Guercio, Acting District Director of Immigration and Naturalization at Los Angeles, California and Joseph A. Dummel, Special Inquiry Officer, Immigration Service at Los Angeles, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: January 21, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15414

PETER HOLZ, also known as PETER HOLZ-
MULLER, Petitioner,

vs.

ALBERT DEL GUERCIO, Acting District Di-
rector of Immigration and Naturalization at
Los Angeles, California, and JOSEPH A.
DUMMEL, Special Inquiry Officer, Immigra-
tion Service at Los Angeles, Respondents.

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Appellant Peter Holz, also known as Peter Holz-
Muller, by his attorneys Gross and Svenson, hereby
adopts the Statement of Points on Appeal and the
Designation of Contents of Record on Appeal ap-
pearing in the typewritten transcript of the record.

Dated this 23rd day of January, 1957.

GROSS AND SVENSON,
/s/ By H. J. GROSS,
Attorneys for Petitioner and
Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 24, 1957. Paul P.
O'Brien, Clerk.

No. 15414

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER HOLZ, also known as PETER HOLZ-MULLER,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization at Los Angeles, California and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration Service at Los Angeles,

Appellees.

BRIEF FOR APPELLEES.

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FILED

JUN 6 1957

PAUL P. O'BRIEN, CLERK

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No. 15414

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER HOLZ, also known as PETER HOLZ-MULLER,

Appellant,

vs.

ALBERT DEL GUERCIO, Acting District Director of Immigration and Naturalization at Los Angeles, California and JOSEPH A. DUMMEL, Special Inquiry Officer, Immigration Service at Los Angeles,

Appellees.

BRIEF FOR APPELLEES.

Jurisdiction.

Appellant, plaintiff below, brought action in the District Court for review of an order of deportation outstanding against him, praying that such order be declared void and seeking to enjoin its enforcement [R. 3-15].¹ Judgment was entered in favor of appellees [R. 24-25]. The Court below had jurisdiction of appellant's action under

¹"R." refers to the Printed Transcript of Record. "Br." indicates references to Appellant's Opening Brief. Page references to the deportation hearing contained in Defendant's Exhibit "A" will be indicated by "Hg." Exhibits attached to the deportation hearing will be referred to as "Hg. Ex.", followed in some cases by the page number of the exhibit.

the provisions of Section 10 of the Act of June 11, 1946 (Administrative Procedure Act), 60 Stat. 243, 5 U. S. C. A., Sec. 1009 (*Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955)); and since its judgment was a final decision, jurisdiction is conferred upon this Court pursuant to 28 U. S. Code, Section 1291.

Statement of the Case.

Appellant is an alien, a native of Rumania [Hg. Ex. 2, p. 1], who last entered the United States during November, 1953 [Hg. 4; Hg. Ex. 2, p. 4]. On March 3, 1954 a Warrant of Arrest was issued by the District Director, Immigration and Naturalization Service, Los Angeles, California, charging in substance that appellant was subject to deportation upon the following two grounds: (1) that at the time of his last entry he was excludable as an alien who was not in possession of a visa or other valid entry document; (2) that at the time of his last entry he was excludable as an alien who, during war or a national emergency, had departed from the United States to avoid service in the armed forces [Hg. Ex. 1].

On April 9, 1954 a deportation hearing was held; and on June 7, 1954 the Special Inquiry Officer who presided at the hearing rendered his decision, ordering that appellant be granted voluntary departure; but that if appellant failed to depart when and as required, the privilege of voluntary departure should be withdrawn without further notice or proceedings and that appellant be deported from the United States in the manner provided by law under

the charges contained in the warrant of arrest. This decision was sustained by the Board of Immigration Appeals [Deft. Ex. "A"].

On October 19, 1955 appellant filed a complaint in the Court below for review of the order of deportation outstanding against him, praying that such order be declared void and seeking to enjoin its enforcement [R. 3-15]. The District Court upheld the validity of the order of deportation and entered judgment in favor of appellees [R. 21-25]. From this judgment the present appeal was taken.

Issues Presented.

1. Is there reasonable, substantial, and probative evidence to support the order of deportation outstanding against appellant?
2. Were the deportation proceedings relating to appellant fair, in accordance with law, and in accord with appellant's constitutional rights?

Statutes Involved.

1. Section 241(a)(1) of the Immigration and Nationality Act, 66 Stat. 204, 8 U. S. C. A., Sec. 1251(a), provides:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

2. Section 212(a) of the Immigration and Nationality Act, 66 Stat. 182, 8 U. S. C. A., Sec. 1182(a) provides in pertinent part:

“(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

“(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181 (e) of this title;

* * * * *

“(22) * * * persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens who seek to reenter the United States as non-immigrants;”.

ARGUMENT.

I.

There Is Reasonable, Substantial, and Probative Evidence to Support the Order of Deportation Outstanding Against Appellant.

There was reasonable, substantial, and probative evidence adduced at appellant's deportation hearing to support the order of deportation now outstanding against him (Sec. 242(b)(4) of the Immigration and Nationality Act, 66 Stat. 209, 8 U. S. C. A., Sec. 1252(b)(4); see, *Ocon v. Del Guercio*, 237 F. 2d 177, 180 (C. A. 9, 1956); *Navarrette v. Landon*, 223 F. 2d 234, 236 (C. A. 9, 1955), fn. 2).

Appellant was born in Rumania on April 30, 1931 [Hg. Ex. 2, p. 1]. He was first admitted to the United States on May 27, 1950 for permanent residence [Hg. 3-4, 12-13; Hg. Ex. 2, p. 2; Hg. Ex. 3]. During August, 1950 appellant registered for the draft [Hg. 17, 22]; and on December 18, 1950 appellant was issued a Declaration of Intention to become a citizen of the United States by the Clerk of the United States District Court for the Southern District of California [Hg. 21, Hg. Ex. 5].

During March, 1952 appellant received a notice from his local draft board to report for induction [Hg. 4; Hg. Ex. 2, p. 3]. He appeared at the draft board and demanded that he be made a citizen before being inducted into military service [Hg. 13-14, 23]. At about the same time appellant sought at the Federal Building, Los Angeles, California, to return the Declaration of Intention which had been issued to him on December 18, 1950 [Hg. 23]. Not succeeding, he mailed this Declaration of Intention to the Immigration and Naturalization Service, Washington, D. C., with a letter which stated in

part: "I have a legacy in Germany and I would not be able to take out the legacy of Germany, if I am an American Citizen" [Hg. 21-23, Hg. Ex. 5].

On April 2, 1952 appellant departed from the United States and went to Mexico after, according to his testimony, he had been approached by a member of the F.B.I. who told him that he would be arrested the next day [Hg. Ex. 2, p. 3]. Appellant remained in Mexico continuously from April 2, 1952 until sometime during October, 1953 [Hg. 4-5; Hg. Ex. 2, pp. 2-4], when he returned to the United States and was admitted upon the presentation of his Alien Registration Card [Hg. 5-6; Hg. Ex. 2, p. 4]. On October 19, 1953, appellant was issued a visa by the Mexican Consul, Los Angeles, California, valid for six months, whereupon he again went to Mexico, remaining about two weeks [Hg. 5-6; Hg. Ex. 2, p. 4]. Appellant last entered the United States during November, 1953 upon the presentation of his Alien Registration Card [Hg. 4; Hg. Ex. 2, p. 4]. At the time of his last entry, appellant intended to reside in the United States permanently [Hg. 5; Hg. Ex. 2, p. 4]. He did not have a visa or any other document for entry except his Alien Registration Card [Hg. 5; Hg. Ex. 2, p. 4].

An alien has no right to enter the United States without a visa or other valid entry document (Sec. 211 of the Immigration and Nationality Act, 66 Stat. 181, 8 U. S. C. A., Sec. 1181; *United States ex rel. Polymeris et al. v. Trudell*, 284 U. S. 279 (1932); *Taranto v. Haff*, 88 F. 2d 85 (C. A. 9, 1937); *United States ex rel. Santarelli v. Hughes*, 116 F. 2d 613 (C. A. 3, 1940); *Haff v. Tom Tang Shee*, 63 F. 2d 191 (C. A. 9, 1933)). As this Court in *Taranto v. Haff*, *supra*, declared (p. 85):

" . . . A returning alien from abroad must present an immigration visa or a return permit and

‘must show not only that they ought to be admitted, but that the United States by the only voice authorized to express its will has said so’ (citation)”.

It is clear that when appellant last entered the United States during November, 1953, he was without a visa or other valid entry document. The waiver of visa requirements on behalf of an alien previously lawfully admitted to the United States for permanent residence who departs temporarily to Mexico is limited to those who return from such absence within six months (8 C. F. R. 211.2(c)(1)). Appellant was absent approximately eighteen months; consequently, his Alien Registration Card was invalid as an entry document. The first charge, therefore, is unequivocally established, and is in itself sufficient to support the order of deportation outstanding against appellant.

There is also reasonable, substantial, and probative evidence to support the decision of the Special Inquiry Officer that appellant departed from the United States for the purpose of avoiding service in the armed forces. On March 2, 1954, when being interviewed by the Immigration and Naturalization Service, appellant answered questions as follows [Hg. Ex. 2, p. 3]:

“Q. Then when you departed from the United States on April 2, 1952 at El Paso, Texas did you depart for the purpose of avoiding service in the Armed Forces of the United States? A. Well, yes, I did.

Q. Did you have any other reason for departing from the United States on April 2, 1952? A. No, I didn’t know anyone in Mexico or have any job, and I didn’t have any other reason to go there. I was scared, that’s all.”

At the deportation hearing appellant denied that he departed from the United States to avoid military service [Hg. 13] and testified that he wanted to be made a citizen before entering military service for fear of what would happen to him if he were captured without being a citizen [Hg. 13-14, 17]. However, his claimed desire to become a citizen before induction is contradicted by the return of his Declaration of Intention after being ordered to report for induction with remarks indicating that he did not want American citizenship [Hg. 21-23; Hg. Ex. 5]. Moreover, appellant departed from the United States during the time hostilities in Korea were taking place, and remained until approximately three months after hostilities had ended;² therefore, it is reasonable to infer that he departed in order to avoid service in Korea.

II.

The Deportation Proceedings Relating to Appellant Were Fair, in Accordance With Law, and Did Not Violate Any of Appellant's Constitutional Rights.

Appellant apparently seeks to attack the order of deportation outstanding against him by urging that he "was misled into a bad decision by the action of the local (draft) board so as to be deprived of an intelligent choice and so was deprived of due process" (Br. 4). Appellant then concludes: "The Immigration Service officer hearing, while perfectly fair as far as he went, declined to go into this question. He restricted himself to the technical phases of the illegal entry of November, 1953" (Br. 5).

²Hostilities in the Korean War lasted from June 25, 1950 to July 27, 1953 (World Almanac, 1954, p. 48).

The record discloses, however, that due consideration was given during appellant's deportation proceedings of the alleged events occurring before the draft board. Appellant was permitted to testify fully concerning draft board proceedings; and both the Special Inquiry Officer and the Board of Immigration Appeals in their decisions, discussed his testimony and its effect [see pp. 1-2, 3 of Decision of Special Inquiry Officer dated June 7, 1954, and pp. 4-6 of decision of Board of Immigration Appeals, dated November 29, 1954, contained in Deft. Ex. "A"].

Moreover, the record does not support appellant's contention that he was misled or deprived of an intelligent choice. The position of appellant, while not so stated by him, seems to be analogous to the assertion of the defense of entrapment in criminal cases. It is well settled that entrapment exists only when government agents induce and originate the criminal intent of a defendant (*Sorrels v. United States*, 287 U. S. 435 (1932); *Grimm v. United States*, 156 U. S. 604, 609-611 (1895); *United States v. Lemons*, 200 F. 2d 396, 397 (C. A. 7, 1952); *United States v. Lindenfeld*, 142 F. 2d 829 (C. C. A. 2, 1944), cert. den. 323 U. S. 761; *Ratigan v. United States*, 88 F. 2d 919, 922 (C. C. A. 9, 1937), cert. den. 301 U. S. 705; *Fiunkin v. United States*, 265 Fed. 1 (C. C. A. 9, 1920)). The intent of appellant to leave the United States to avoid military service originated solely with him.

In addition, it appears that appellant did not desire advice or information. Before his departure, he did not tell anyone where he was going [Hg. 17]; although his parents and sister were in the United States [Hg. 8]; and their views could have been obtained. During the period of approximately 18 months that appellant remained in Mexico he sought no advice [Hg. 24]; even

though he corresponded with his parents in the United States during this time [Hg. 18]. The evidence shows that appellant, rather than being misled, intelligently, deliberately, and intentionally departed from and remained outside of the United States to avoid service in the armed forces.

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the judgment of the District Court in favor of appellees, denying the relief prayed for in appellant's complaint, should be affirmed.

Respectfully submitted,

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No. 15,415

United States Court of Appeals
For the Ninth Circuit

CHENG LEE KING,

Appellant,

VS.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Appellee.

BRIEF FOR APPELLANT.

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FILED

MAR 19 1957

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No. 15,415

United States Court of Appeals For the Ninth Circuit

CHENG LEE KING,

Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the Court below by the Declaratory Judgment Act (28 U.S.C., Sec. 2201, 62 Stat. 964, as amended, 63 Stat. 105), which provides as follows:

“In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.”

Jurisdiction is also conferred upon the Court below by Section 10 of the Administrative Procedure Act (5 U.S.C., Sec. 1009, 60 Stat. 243), which provides in pertinent part, as follows:

“Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion. (a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

Jurisdiction to review the judgment of the Court below is conferred upon this Court by 28 U.S.C., Sec. 1291.

The claim of right to adjustment of status, and denial of that right by the appellee are pleaded in the complaint (T. 4-15) and the amended complaint (T. 16-17).

STATEMENT OF THE CASE.

The appellant is a native and citizen of China and resided in that country from the time of his birth, in 1913, until 1924, when his father took him to Singapore, Malay States. Appellant resided in Singapore until 1939 at which time he obtained employment as a seaman.

During World War II, appellant worked on various ships of the Allied Forces sailing out of British ports to the Mediterranean area. The appellant sailed on Panamanian (American owned) and American

vessels out of United States ports from about September of 1945 until August 20, 1953, the date of his last entry into the United States. Subsequently, appellant has been employed ashore in the United States due to his inability to obtain employment as a seaman.

On December 21, 1953, appellant filed an application for adjustment of his status to that of an alien lawfully admitted for permanent residence on the ground that he would be subjected to physical persecution if deported to Communist China pursuant to Section 6 of the Refugee Relief Act of 1953, (50 U.S.C., Appendix Sec. 1971d, 67 Stat. 403, as amended 68 Stat. 1044).¹

¹"Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of the enactment of this Act and is otherwise qualified under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within

Said application was denied by the Regional Commissioner of the Immigration and Naturalization Service, the appellee herein, acting as the designated delegate of the Attorney General pursuant to regulations. (8 C.F.R. 245a.11-1955 Supp.)

In the course of administrative proceedings and in the Court below, it was conceded that appellant's country of last foreign residence is Singapore. It was further conceded that appellant does not fear that he would be subjected to physical persecution by the governmental authorities of Singapore. His inability to return to Singapore is due solely to the fact that the British authorities have concluded that he is inadmissible and have, therefore, denied his application for a visa to enter Singapore as a permanent resident. Thus, the only country that appellant could enter or be deported to is Communist China. It is undisputed that appellant is unable to return to Communist China because of fear of persecution.

the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided*, That the provisions of this section shall not be applicable to any aliens admitted to the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754), Public Law 402, Eightieth Congress, second session (62 Stat. 6): *Provided Further*, That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand."

As originally worded, the Section limited relief to the alien who could establish that "persecution or fear of persecution" resulted from events which had occurred subsequent to his entry into the United States.

The sole issue presented to the Court below was whether the appellee had properly construed Section 6, *supra*, in denying appellant's application for adjustment of status. This issue was submitted to the trial Court on the pleadings, certified record of the Immigration and Naturalization Service, letter of September 4, 1956, from the office of the British Consulate General stating that appellant is inadmissible to Singapore, and briefs of both parties to the suit.

The Court below affirmed the decision of the Regional Commissioner on the ground that:

"... the adjustment of status sought by plaintiff under Section 6 of the Refugee Relief Act of 1953 was properly denied in that plaintiff is not unable to return to the country of his last residence because of persecution or fear of persecution on account of race, religion or political opinion." (T. 24.)

The sole question involved is whether the Court below has erroneously construed Section 6 of the Refugee Relief Act of 1953, *supra*, in its decision denying appellant's request for a declaratory judgment.

SPECIFICATION OF ERRORS.

Appellant has specified the following point on which he intends to rely on this appeal:

"1. The Trial Court erred in its construction of Section 6 of the Refugee Relief Act of 1953, 67 Stat. 336 (50 U.S.C. Appendix 1971d) by deciding that plaintiff is ineligible for adjustment

of status under that Act because his inability to return to Singapore, the country of his last residence, is based upon the impossibility of procuring the requisite documents to enter Singapore, rather than upon persecution or fear of persecution in that country" (T. 28).

ARGUMENT.

1. REFUGEE RELIEF ACT OF 1953.

The Refugee Relief Act of 1953, *supra*, provides for the issuance of immigration visas to refugee aliens outside the United States who fit within certain categories defined by the Act. The matter of determining whether an application for a visa under the Act shall be granted to a refugee alien outside the United States is left entirely to administrative agencies of the federal government. On the other hand, refugee aliens within the United States who apply for adjustment of status under Section 6 of the Act need not fit within the categories set up under the other provisions of the Act. If they meet the requirements of that Section, the Regional Commissioner, acting as the designated representative of the Attorney General, must report to Congress all the pertinent facts in the case. Congress has reserved unto itself the function of determining whether the application shall be granted.

Cheng Fu Sheng v. Barber, 144 F. Supp. 913.

The Regional Commissioner of the Immigration and Naturalization Service determined that the appellant

fails to meet the requirements set forth in the following portion of Section 6 of the Refugee Relief Act of 1953:

“Any alien who establishes . . . that he is unable to return to the country of his birth, *or* nationality, *or* last residence because of persecution or fear of persecution. . . .” (Emphasis supplied.)

In the vast majority of applications, the applicant's country of birth, nationality and last residence are identical and in such cases, the language of that portion of the statute quoted above presents no problem. A question of statutory construction arises only in those situations where more than one country is involved.

Ordinarily, the word “or” in a statute is to be construed as a disjunctive participle, providing an alternative, and corresponding to “either”.

In re Rice, 165 F. 2d 617, 619 (C.A.D.C.);

Gay Union Corporation v. Wallace, 112 F. 2d 192, 196 (C.A.D.C.).

The appellant would clearly be eligible for adjustment if the above rule of construction were adopted as it would only be necessary to establish fear of persecution as to one of the three alternative countries. If the Act were so construed, however, the result would be to make a category of individuals eligible for adjustment whom Congress, in all probability, had no intention of benefiting. Said category is composed of those aliens who do not fear persecution in one of the three countries specified in Section 6 *and are*

able to return to that country. A case in point is, *Fong Sen v. U.S. Immigration and Nat. Service*, 137 F. Supp. 236, where the plaintiff's country of birth and nationality was China and country of last residence was Hong Kong. The Court in that case affirmed the Regional Commissioner's denial of the plaintiff's application under Section 6 on the ground that plaintiff *was able* to return to Hong Kong and that he would not be persecuted there.

Furthermore, Congress has, subsequent to the enactment of Section 6, clearly manifested its intention that the word "or" is not to be given its normal disjunctive meaning in that section. The opinion of the Court below refers to Senate Report 2045 on House Bill 8193 wherein the Senate Judiciary Committee expressed its intention that:

" . . . if the applicant for adjustment is *able to return to any such country* without persecution or fear of persecution, he is not eligible for adjustment." (Emphasis supplied.)²

The Court below relies, in part, upon the above quoted language to justify the assumption that Congress intended the word "and" to be substituted for "or" whenever the applicant's country of birth, nationality and last residence are not one and the same. Appellant contends that substitution of "and" for "or" is warranted only if the applicant for adjustment fails to establish that he would be subjected to persecution upon return to one of the specified coun-

²U.S. Code Cong. and Adm. News, 83rd Congress, 2nd Session, Vol. 3, at page 3692.

tries, and also fails to show that he is unable, in fact, to return to that particular country. Where, however, an applicant establishes that he is unable to return to the country of his birth and nationality because of fear of persecution, and that he is unable to gain admission to the country of his last residence, the substitution of "and" for "or" cannot be justified by the plain meaning of Section 6 nor by the legislative history pertaining thereto.

2. LEGISLATIVE HISTORY OF THE REFUGEE RELIEF ACT OF 1953.

The legislative history of the Refugee Relief Act of 1953 evidences Congress' concern with the political, social and economic problems created by the fact that many thousands of persons were left homeless as a result of the emergence of new totalitarian states after World War II. The Act was designed, in part, to alleviate overpopulation pressures abroad and to thereby further the objectives of American foreign policy. Primarily, however, the Act had the humanitarian purpose of providing a permanent home to those unfortunate individuals who, either abroad or in the United States, have nowhere to turn but toward the Iron Curtain. Congress' desire to afford relief to the victims and potential victims of Communist oppression is expressed throughout the Report of the House Judiciary Committee on House Bill 6481.³

³House Report 974, U.S. Code Cong. and Adm. News, 83rd Congress, 1st Session, Vol. 2, page 2103 et seq.

Said Report also contains a letter addressed to the Honorable Joseph W. Martin, Jr., Speaker of the House of Representatives, from the President of the United States, expressing his solicitude for the plight of the refugee which states in part:

“ . . . these refugees and escapees searching desperately for freedom look to the free world for haven. . . . They look to traditional American humanitarian concern for the oppressed.”⁴

To deny relief under Section 6 of the Act to appellant frustrates the very purpose of the legislation. Appellant has established that he would be subjected to physical persecution if he were forced to return to Communist China, the country of his birth and nationality. Yet, denial of his application would result in immediate steps being taken by the Immigration and Naturalization Service to effect appellant's deportation to Communist China. *Such a result was the very thing Congress intended to prevent by enactment of the Refugee Relief Act of 1953.* The fact that appellant's country of last residence is Singapore, Malay States, should have no bearing on his eligibility for adjustment once it is shown that he cannot return there. He has established that the only country that will admit him within its borders as a permanent resident is a totalitarian state where he will be persecuted. He is in fact a refugee and it is inconceivable that Congress desired to make a distinction between him and the individual whose country of birth, nationality

⁴U.S. Code Cong. and Adm. News, 83rd Congress, 1st Session, Vol. 2, at pages 2103, 2104.

and last residence is China. In either case Communist China is the only country to which admission can be gained. Such a distinction is unreasonable and cannot be supported by the history or the purpose of the legislation.

In *D'Antonio v. Shaughnessy*, 139 F. Supp. 719, the Court in discussing Section 6 of the Refugee Relief Act points out at footnote 2, page 721, that:

“The amendment of August 31, 1954 was a liberalizing amendment in that it eliminated the qualification that the ‘persecution or fear of persecution’ must have resulted from events which had occurred subsequent to the alien’s entry into the United States.”

The Court, in that case, was concerned with a different problem of statutory construction than we have here. Nevertheless, it is of interest to note that the Court considered Section 6 as a statute which was enacted for the purpose of preventing an alien from being deported to a country wherein he faces persecution. That section was compared with Section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h), 66 Stat. 212).⁵

The Court states at pages 722 and 723 as follows:

“Furthermore, the very language used in the statute under consideration—Section 1971d, Section 6 of the Refugee Relief Act—provides internal evidence of a broader policy on the part of Congress

⁵“The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.”

in enacting that section, when that language is compared with the wording of a cognate statute such as Section 1253(h) of Title 8 U.S.C.A. *While both deal with the problem of a deportee facing deportation to a country wherein he may be persecuted* (emphasis supplied by writer) under section 1253(h) the immigrant must show fear of *'physical persecution'* (emphasis supplied by court) and even then the action on the part of the Attorney General in staying deportation is apparently at his discretion."

3. THE COURT BELOW ERRONEOUSLY CONSTRUED SECTION 6 OF THE ACT.

The decision of the Court below is based, in part, upon its interpretation of a portion of the Report of the Senate Judiciary Committee on House Bill 8193, which is set forth below:

"The committee has restored the language 'birth, or nationality, or last residence', which is the language presently contained in Section 6 of the Refugee Relief Act of 1953. The committee understands that this language has been construed by the Immigration and Naturalization to mean that if the applicant for adjustment is able to return to any such country without persecution or fear of persecution, he is not eligible for adjustment. Since, the existing language, as construed, correctly expresses the intent of the section, no purpose would be served by modifying the language as proposed in the bill."⁶

⁶Senate Report 2045, U.S. Code, Cong. and Adm. News, 83rd Congress, 2nd Session, Vol. 3, pages 3691, 3692. A revision of the language, "Birth or nationality or last residence" had been proposed in House Bill 18193, 83rd Congress, 2nd Session.

On the basis of the above quotation, the Court below concluded that Congress intended that if the three countries referred to in Section 6 are different, it is then incumbent upon an applicant to establish fear of persecution in each country, notwithstanding the fact that he is unable to return to one of the countries due to inadmissibility. It is appellant's contention that the plain meaning of the above quoted language does not support the conclusion reached by the Court below. The key words of the quotation are, "is able to return". *That is, ability to return is a prerequisite to the duty of establishing fear of persecution as to any particular country.*

To require proof of persecution in one of the specified countries when an applicant cannot, in fact, return thereto, is to place an undue burden upon the applicant which was not intended by Congress. How can an applicant possibly know whether he would be persecuted in a particular country when he cannot return to that country. His return can only be considered as a hypothetical proposition, so if he attempted to prove persecution he would be forced to engage in rife speculation.

In the Court below, appellant urged that the Refugee Relief Act is remedial legislation and as such should be liberally construed. Although the Court conceded that the Refugee Relief Act may be characterized as remedial legislation, appellant's contention that the Act should be liberally construed was rejected. The Court held that such construction would increase the number of eligible applicants, and thus,

add to the burden of Congress in selecting those applicants to be granted permanent residence. Nothing is contained in the Act itself nor in its legislative history which would suggest that Congress was concerned with being overburdened by the number of cases presented. Section 6 explicitly provides for the adjustment of status of up to 5,000 aliens within the United States. The deadline for filing applications under Section 6 was June 30, 1955. Yet, only 4,808 applications had been submitted to Congress pursuant to Section 6 as of January 2, 1957, according to information furnished to counsel for the appellant in the form of a letter from Walter M. Besterman, Legislative Assistant to the House Committee on the Judiciary.⁷ It would, therefore, appear that Congress

⁷The letter referred to above has been filed with the Clerk of this Court and is reprinted in full, as follows:

"House of Representatives, U.S.

Committee on the Judiciary

Washington, D.C.

January 2, 1957

Robert S. Bixby, Esquire
Fallon and Hargreaves
550 Montgomery Street
San Francisco 11, California

Dear Mr. Bixby:

In reply to your letter of December 17, please be advised that 4,808 applications have been submitted to Congress pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953, as amended. Of those cases, 1,714 are presently under consideration, 330 were disapproved, and 24 were withdrawn from the Congress by the Attorney General. The remainder of those cases were approved and included in concurrent resolutions.

Sincerely yours,

/s/ W. Besterman

Walter M. Besterman

Legislative Assistant"

has not been overburdened and has, in fact, received less applications than anticipated.

In any event, the appellant's situation is highly unusual and very few additional applicants are in a similar position. To grant relief to the appellant would certainly not materially increase the burden on Congress.

Those Courts, other than the Court below, that have had occasion to consider the proper construction of Section 6 of the Act have decided that it should be liberally construed.

In *D'Antonio v. Shaughnessy*, 139 F. Supp. 719, the Court said at page 723:

“Thus, the statute applicable to the instant case (Section 6 of the the Refugee Relief Act of 1953) apparently reflects a liberal and remedial purpose on the part of Congress; and it should be construed to effectuate that purpose.”

The above case was cited with approval in this District by Judge Murphy in *Sun v. Barber*, 114 F. Supp. 850, wherein the Court was also presented with a question of the proper construction of Section 6 of the Refugee Relief Act. In the recent case of *Foo v. Brownell*, (U.S.D.C., Dist. Col., 2/8/57) not yet reported, Judge Holtzoff liberally interpreted the provisions of Section 6 in accordance with *Sun v. Barber*, supra.

CONCLUSION.

It is submitted that the Court below erroneously construed Section 6 of the Refugee Relief Act of 1953, and that the judgment should be reversed.

Dated, San Francisco, California,

March 17, 1957.

FALLON AND HARGREAVES,

Attorneys for Appellant.

No. 15415

United States
Court of Appeals
for the Ninth Circuit

CHENG LEE KING,

Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

FEB - 8 1957

PAUL P. O'BRIEN, CLERK



No. 15415

United States
Court of Appeals
for the Ninth Circuit

CHENG LEE KING,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1955

May 3—Filed complaint—issued summons.

* * *

Aug. 25—Filed amended complaint.

* * *

Oct. 5—Filed answer of defendant to complaint
and amended complaint.

1956

* * *

Sept. 11—Court trial. Evidence and exhibits introduced, arguments heard, memos. ordered filed 10-5 days and case continued to Sept. 27, 1956, for submission. (Goodman)

* * *

Sept. 27—Ordered case submitted. (Goodman)

Oct. 5—Filed memo. opinion affirming judgment of Regional Commissioner. (Goodman)

Nov. 1—Entered judgment—filed Nov. 1, 1956—affirming decision of Regional Commissioner of Immig. & Natiz. that plaintiff is not unable to return to country of last residence. (Goodman)

* * *

Nov. 14—Filed notice of appeal by plaintiff.

Nov. 14—Filed appeal bond in sum \$250.00. (cash)

Nov. 14—Filed appellant's designation of record on appeal.

Nov. 14—Filed statement of points upon which appellant intends to rely on appeal.

United States District Court, in and for the Northern District of California, Southern Division

Civil No. 34618

CHENG LEE KING,

Plaintiff,

vs.

DAVID H. CARNAHAN, as Regional Commissioner of the Immigration and Naturalization Service,

Defendant.

COMPLAINT

ACTION FOR DECLARATORY JUDGMENT

Comes now the plaintiff, Cheng Lee King, and for cause of action alleges, as follows:

I.

That this is an action for a Declaratory Judgment under the Declaratory Judgment Act (28 USC 2201) and for a review under the Administrative Procedure Act (5 USC 1001, et seq.).

II.

That the plaintiff is a resident of the City and County of San Francisco, State of California, and a native and citizen of China.

III.

That the defendant, David H. Carnahan, is the Regional Commissioner of the Southwest Region of the United States Immigration and Naturalization

Service and that said district includes the State of California and the City of San Francisco.

IV.

That the defendant, David H. Carnahan is charged with the duty to make a final determination on all applications filed within his district pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953.

V.

That on or about the 21st day of December, 1953, the plaintiff filed an application for adjustment of his Immigration status to that of a permanent resident to Section 6 of the Refugee Relief Act of 1953 with Bruce G. Barber, the District Director of the Immigration and Naturalization Service, San Francisco, California.

VI.

That on or about June 6, 1954, plaintiff was accorded an informal interview after which his application was denied on the alleged ground that he last entered the United States subsequent to July 1, 1953, and was, therefore, ineligible for adjustment of his immigration status to that of a permanent resident. A copy of said Order is attached hereto, marked Exhibit "A" and made a part of this Complaint.

VII.

That by order dated September 23, 1954, the Assistant Commissioner, Inspections and Examinations Divisions, Washington, D. C., reversed the pro-

posed decision and remanding the case for further proceedings. A copy of said decision is attached hereto, marked Exhibit "B" and made a part of this Complaint.

VIII.

That plaintiff was accorded a second informal interview on or about the 17th day of December, 1954, after which his application for adjustment of status was denied by order of H. H. Engelskirchen, Special Inquiry Office, San Francisco, California, which decision was affirmed by defendant on February 11, 1955. A copy of said decision is attached hereto, marked Exhibit "C" and made a part of this complaint.

IX.

That plaintiff was denied adjustment of his Immigration status by the defendant on the alleged ground that plaintiff is able to return to Singapore, the place of his last residence without persecution or fear of persecution.

X.

Prior to said hearing on or about July 13, 1954, plaintiff applied for a visa to enter Singapore from the proper British authorities; that plaintiff's, application for entry into Singapore was denied on July 17, 1954, by said British authorities.

XI.

That the only country that will accept plaintiff is China, the country of his birth and nationality.

XII.

That defendant has found that plaintiff is a person of good moral character, is anti-communist, and will be subjected to persecution or fear of persecution if returned to China, the country of his birth and nationality.

XIII.

That the decision of the defendant is a final order from which the plaintiff has no administrative appeal; that plaintiff has exhausted all administrative remedies before filing this complaint.

XIV.

That the decision of the defendant, marked Exhibit "C," is erroneous, in that, it is based on an improper interpretation or construction of Section 6 of the Refugee Relief Act of 1953.

XV.

That plaintiff is eligible for adjustment of his immigration status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953 as amended.

Wherefore, plaintiff requests a judgment declaring:

1. That plaintiff's application for adjustment of status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953 may not be denied by the defendant on the ground that plaintiff is able to return to the place of his last residence without persecution or

fear of persecution because of race, religion or political opinion.

2. For such other and further relief as is deemed by the Court to be proper.

Dated: 5/3/55.

FALLON AND HARGREAVES,
By /s/ ARLIN W. HARGREAVES,
Attorneys for Plaintiff.

EXHIBIT A

United States Department of Justice Immigration
and Naturalization Service

File: 1300-133243-San Francisco

Serial Number: 256

In Re: Lee, Nee Yuet, aka Cheng, Lee King

Proceeding Under Section 6 of the Refugee Relief
Act of 1953.

In Behalf of Applicant:

Fallon and Hargreaves,
Attorneys at Law,
550 Montgomery Street,
San Francisco, California.

Application: Adjustment of Immigration status.

The applicant is forty years of age, single, male, and a native and citizen of China. He last entered the United States at Baltimore, Maryland, on Au-

gust 20, 1953, when he was admitted as a seaman under the provisions of Section 101 (a) (15) (D) of the Immigration and Nationality Act.

One of the requirements for adjustment of status under Section 6 of the Refugee Relief Act is that the entry of an applicant into the United States has to be prior to July 1, 1953. As the applicant last entered the United States subsequent to that date, his application must be denied.

Recommendation: It is recommended that the alien's application for adjustment of immigration status under the provisions of Section 6 of the Refugee Relief Act of 1953 be denied for the reason that he last entered the United States subsequent to July 1, 1953.

/s/ L. W. MARSTON,
Immigration Officer.

EXHIBIT B

United States Department of Justice Immigration
and Naturalization Service

September 23, 1954.

File: 1300-133243-San Francisco
Serial No. 256

In Re: Nee Yust Lee, aka Cheng Lee King.

Proceedings under Section 6 of the Refugee Relief
Act of 1953.

In Behalf of Applicant:

Fallon and Hargreaves,
Attorneys at Law,
550 Montgomery Street,
San Francisco, California.

Application: Adjustment of Immigration status.

The immigration officer has recommended that this application be denied because of the absence from the United States of the applicant after July 1, 1953. In view of the fact, however, that one of the specific requirements for eligibility under Section 6 is that the applicant be present in the United States on August 7, 1953, it is clear that the law contemplates the possibility of an absence after July 1, 1953. It is therefore concluded that the alien's temporary absence from the United States after July 1, 1953, does not preclude him from establishing eligibility under the provisions of Section 6 of the Refugee Relief Act of 1953.

Order: It is ordered that this case be remanded to the immigration officer for further proceedings consistent with the foregoing.

ASSISTANT COMMISSIONER,
Inspections and Examinations
Division.

SI/mf

EXHIBIT C

United States Department of Justice Immigration
and Naturalization Service

File: 1300-133243-San Francisco
Serial Number: 256

In Re:

Lee, Nee Yuet
aka Lee, Cheng King
and Cheng, Lee King

Proceedings Under Section 6 of the Refugee Relief Act of 1953, as Amended.

In Behalf of Applicant:

Fallon and Hargreaves,
Attorneys at Law,
550 Montgomery Street,
San Francisco, California.

Application: Adjustment of immigration status.

The applicant is a 41-year-old single male alien, a native and citizen of China. He last entered the United States at the port of San Francisco, California, on August 20, 1953, at which time he was admitted as an alien crewman for a period not to exceed twenty-nine days under the provisions of Section 101 (a) (15) (D) of the Immigration and Nationality Act. His application for adjustment of immigration status is apparently based upon entry at San Francisco on April 29, 1953, as a member of the crew of the S. S. "Harvard Victory," at which

time he was also admitted under the provisions of Section 101 (a) (15) (D) of the aforesaid Act. The applicant testified that he entered the United States many times as an alien seaman between 1945 and August 20, 1953, and that on the occasion of each entry it was his intention to depart from the United States pursuant to the terms of his admission in pursuit of his calling. From all of the evidence of record the conclusion is warranted that the applicant on all of the occasions of his entries to the United States was a bona fide crewman, or seaman, and was lawfully admitted to the United States as such.

The record discloses the original hearing in this case was conducted on June 16, 1954, and the examining officer who conducted that proceeding recommended the alien's application be denied on the ground that he last entered the United States subsequent to July 1, 1953. The Assistant Commissioner, Inspections and Examinations Division, Immigration and Naturalization Service, Washington, D. C., in order dated September 23, 1954, remanded this case to the field for further proceedings, stating a temporary absence from the United States subsequent to July 1, 1953, would not preclude an applicant establishing eligibility under the provisions of Section 6 of the Refugee Relief Act of 1953, as amended.

The applicant testified that he was physically present in the United States on August 7, 1953. A certification of arrival on Form I-405 attached to the record discloses that he was admitted to the

United States as an alien crewman at Honolulu, T. H., on August 7, 1953.

The record discloses the applicant was born at King Chow, Hainan Islands, China on June 2, 1913, and that he lived in China until 1924. The applicant testified his father took him to Singapore in 1924, and that he resided therein continuously until 1939. He stated during the period he lived in Singapore he worked in a coffee shop and as a houseboy. He stated his father returned to China immediately after taking him to Singapore, and that his father died in China when he was about twelve years old. The applicant testified that in 1939, he obtained employment as a seaman and that he has been following that occupation ever since. During World War II, he worked on ships sailing out of British ports to the Mediterranean area. About September, 1945, he first arrived in the United States and has sailed out of American ports ever since. He testified that he worked on Panamanian ships in 1946 and 1947 and on American ships from 1947 to 1953. He also testified that since he first entered the United States in 1945, he has always been signed on and discharged from the various ships upon which he worked in American ports. He further testified that he has not been in China at any time since 1924 and that he has not returned to Singapore since 1939. He stated he has not established a residence in any foreign country since 1939. Upon the basis of the foregoing, it is concluded that China is the country of the ap-

[Title of District Court and Cause.]

AMENDED COMPLAINT
Action for Declaratory Judgment
(As of Course)

Comes now the plaintiff, Cheng Lee King, and as of course in accordance with Rule 15 (a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows, to wit:

I.

By adding to the end of paragraph XIV, on page 3, the following:

That plaintiff lawfully entered the United States as a bona fide non-immigrant prior to July 1, 1953, to wit: April 29, 1953; that plaintiff was physically present in the United States on August 7, 1953, to wit: Honolulu, T. H.; that plaintiff is unable to return to the country of his birth or nationality because of persecution or fear of persecution on account of political opinion; that plaintiff is and at all times has been a person of good moral character; that plaintiff is otherwise qualified for admission to the United States under all other provisions of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed.

II.

By amending paragraph XV to read as follows, to wit:

That plaintiff is statutorily eligible for adjustment of his immigration status to that of a permanent resident pursuant to the provisions of Section 6 of the Refugee Relief Act of 1953, as amended.

FALLON AND HARGREAVES,

By /s/ A. W. HARGREAVES,
Attorneys for Plaintiff.

[Endorsed]: Filed August 25, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND
AMENDED COMPLAINT

Comes now David H. Carnahan, as Regional Commissioner of the Immigration and Naturalization Service, defendant in the above-entitled action, and in answer to plaintiff's complaint and amended complaint admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I through VIII of the complaint.

II.

Denies the allegation of paragraph IX and alleges that the reason for denying plaintiff's application for adjustment of his immigration status is fully set forth in the special inquiry officer's recommendation on page 2 of Exhibit "C" of the complaint.

III.

Answering paragraph X, defendant admits that on or about July 13, 1954, plaintiff applied to the British Consulate General in San Francisco for a visa to enter Singapore, but denies the other allegation contained in said paragraph X.

IV.

Answering paragraph XI of the complaint, defendant has no knowledge, information or belief as to the allegations, therein therefore denies the same.

V.

Answering paragraph XII, the defendant alleges that no finding was made as to the good moral character or as to the Communist affiliations or affections of the plaintiff, but on the assumption of the truth of plaintiff's claims the special inquiry officer found that "the applicant was unable to return to China, the country of his birth and nationality, within the meaning of Section 6 of Refugee Relief Act of 1953, as amended" was warranted.

VI.

Defendant admits the allegations contained in paragraph XIII of the complaint.

VII.

Answering paragraph XIV of the complaint as amended, defendant admits that the plaintiff was in Honolulu, T. H., on August 7, 1953; denies that the decision of defendant finding plaintiff ineligible

for relief pursuant to Section 6 of the Refugee Relief Act of 1953, as amended (1971 (d) T. 50 USC) is erroneous; has no knowledge, information or belief as to the other allegations contained in said paragraph XIV and therefore denies the same.

VIII.

Answering paragraph XV of the complaint as amended, defendant denies the allegations contained therein.

Wherefore, Defendant prays that the relief sought by plaintiff be denied; that the complaint and cause of action stated therein be dismissed, and that defendant recover his proper costs therein.

LLOYD H. BURKE,

United States Attorney,

By /s/ CHARLES ELMER COLLETT,

Assistant United States

Attorney.

Affidavit of Mail attached.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause.]

OPINION AND ORDER FOR JUDGMENT

Goodman, District Judge.

Plaintiff seeks review of an order of the Regional Commissioner of the Immigration and Naturaliza-

tion Service issued February 11, 1955, denying his application pursuant to Section 6 of the Refugee Relief Act of 1953, 67 Stat. 336 (50 USC Appendix §1971d), for adjustment of his non-immigrant status to that of an alien lawfully admitted for permanent residence.

Section 6 of the Refugee Relief Act provides that any non-immigrant alien within the United States who is found by the Attorney General to meet certain specified requirements may have his case presented to the Congress for it to decide whether he shall be granted permanent residence. By regulation, 8 C. F. R. §§481.1-481.11, the Regional Commissioners of the Immigration and Naturalization Service have been designated as the delegates of the Attorney General to determine whether an applicant meets the requirements specified in Section 6 for referral to Congress.

One of these requirements is that the alien be "unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion." It is not disputed that fear of persecution bars plaintiff's return to China, the country of both his birth and nationality. However, the country where plaintiff last resided was Singapore where he lived for some fifteen years. The Regional Commissioner denied plaintiff's application for adjustment of status on the ground that his inability to return to Singapore is not on account of persecution or fear of persecution.

Plaintiff concedes that the reason he cannot return to Singapore is not because of fear of persecution but because he is unable to obtain a visa. He contends, however, that the requirements of Section 6 are satisfied if an applicant is unable to return to one of the alternate countries because of fear of persecution, or at all events, if he is unable to return to any of the three alternate countries and his inability to return to one of them is because of fear of persecution.

Although Section 6 refers to the countries of birth, nationality, or last residence in the alternative it is clear that the Congress intended that, if these countries are different, applicants must be unable to return to any of the three. In 1954, a revision of the language "birth, or nationality, or last residence" was proposed in House Bill 18193, 83rd Congress, 2d Session. The Report of the Senate Judiciary Committee on House Bill 8193 (Senate Report 2045) states that "The committee has restored the language 'birth, or nationality, or last residence,' which is the language presently contained in section 6 of the Refugee Relief Act of 1953. The committee understands that this language has been construed by the Immigration and Naturalization to mean that if the applicant for adjustment is able to return to any such country without persecution or fear of persecution, he is not eligible for adjustment. Since, the existing language, as construed, correctly expresses the intent of the section no pur-

pose would be served by modifying the language as proposed in the bill.”

Section 6 quite plainly states that the inability to return to the specified countries must be because of persecution or fear of persecution. There is nothing in the legislative history of Section 6 to suggest that the Congress intended that an alien who could not return to one of the specified countries because of fear of persecution would be eligible for relief under Section 6, if, for different reasons, his return to the alternate countries was also barred.

Plaintiff urges that the Refugee Relief Act is remedial legislation and as such should be liberally construed. It is true that the Refugee Relief Act may be characterized as remedial legislation, but it is also apparent that it was not designed to afford relief to all deserving refugee aliens within the United States. The number of aliens who may be granted permanent residence under the Act is limited to 5,000 regardless of the number of eligible applicants. The construction of Section 6 urged by plaintiff would necessarily increase the number of eligible applicants. It would add to the burden of the Congress in selecting from the eligible applicants those to be granted permanent residence. These considerations militate against giving Section 6 any broader construction than the language, itself warrants.

The decision of the Regional Commissioner is correct and is affirmed.

Present judgment accordingly.

Dated: October 5, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed October 5, 1956.

In the United States District Court for the Northern
District of California, Southern Division
Civil No. 34618

CHENG LEE KING,

Plaintiff,

vs.

DAVID H. CARNAHAN, as Regional Commis-
sioner of the Immigration and Naturalization
Service,

Defendant.

JUDGMENT

Plaintiff's Complaint for Declaratory Judgment and for review of the Order of the Regional Commissioner of the Immigration and Naturalization Service issued February 11, 1955, having come on for hearing, and Fallon and Hargreaves appearing for the plaintiff, Lloyd H. Burke, United States Attorney, and Charles Elmer Collett, Assistant United States Attorney, appearing for the defendant, and the Court having heretofore filed its Opinion and Order for Judgment, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed that the decision of the Regional Commissioner is correct and is affirmed and the adjustment of status sought by plaintiff under Section 6 of the Refugee Relief Act of 1953 was properly denied in that plaintiff is not unable to return to the country of his last residence because of persecution or fear of persecution on account of race, religion or political opinion.

So Ordered.

Dated: November 1st, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed and entered November 1, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

You are hereby notified that the plaintiff, Cheng Lee King, appeals to the United States Court of Appeals for the Ninth Circuit, from the Final Judgment entered in the above action on November 1, 1956.

Dated: December 13, 1956.

FALLON AND HARGREAVES,

By /s/ ARLIN W. HARGREAVES,
Attorneys for Appellant.

[Endorsed]: Filed December 14, 1956.

[Title of District Court and Cause.]

CASH DEPOSIT IN LIEU OF BOND
FOR COSTS ON APPEAL

The undersigned jointly and severally acknowledges that he and his personal representatives are bound to pay to defendant, the sum of Two Hundred Fifty (\$250.00) Dollars, and he hereby deposits in cash the sum of Two Hundred Fifty (\$250.00) Dollars into the registry of this Court in lieu of a bond for costs on appeal.

The condition upon which said deposit is made is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by Notice of Appeal filed December 14, 1956, from the Judgment of this Court entered November 1, 1956, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the Judgment affirmed, or such costs as the Appellate Court may award if the Judgment is modified, then said deposit shall be returned to the undersigned, but if the plaintiff fails to perform this condition, delivery of said deposit to the defendant shall be made forthwith.

/s/ CHENG LEE KING,
Plaintiff.

Signed and acknowledged before me this 14th day of December, 1956.

[Seal] /s/ J. ELEANOR JONES,
Notary Public in and for the City and County of
San Francisco, State of California.
My Commission Expires November 1, 1959.

[Endorsed]: Filed December 14, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Amended Complaint.

Answer to Complaint and Amended Complaint.

Opinion and Order for Judgment.

Judgment.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely.

Appellant's Designation of Record on Appeal.

Plaintiff's Exhibit 1.

Defendant's Exhibit A.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 16th day of January, 1957.

[Seal]

C. W. CALBREATH,
Clerk,

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15415. United States Court of Appeals for the Ninth Circuit. Cheng Lee King, Appellant, vs. David H. Carnahan, as Regional Commissioner of the Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: January 16, 1957.

Docketed: January 22, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15415

CHENG LEE KING,

Appellant,

vs.

DAVID H. CARNAHAN, as Regional Commis-
sioner of the Immigration and Naturalization
Service,

Appellee.

STATEMENT OF POINTS

The points upon which Appellant will rely on appeal are:

1. The Trial Court erred in its construction of Section 6 of the Refugee Relief Act of 1953, 67 Stat. 336 (50 U.S.C. Appendix 1971d), by deciding that plaintiff is ineligible for adjustment of status under that Act because his inability to return to Singapore, the country of his last residence, is based upon the impossibility of procuring the requisite documents to enter Singapore, rather than upon persecution or fear of persecution in that country.

Dated: January 18, 1957.

FALLON AND HARGREAVES,

By /s/ ARLIN W. HARGREAVES,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed January 21, 1957.

No. 15445

United States
Court of Appeals
for the Ninth Circuit

PLUMBING AND PIPE FITTING LABOR-
MANAGEMENT RELATIONS TRUST,
et al., Appellants,
vs.

CONDITIONED AIR AND REFRIGERATION
CO., a corporation, et al., Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division

FILED

MAY 14 1957

PAUL P. O'BRIEN, CLERK

No. 15445

United States
Court of Appeals
for the Ninth Circuit

PLUMBING AND PIPE FITTING LABOR-
MANAGEMENT RELATIONS TRUST,
et al., Appellants,
vs.

CONDITIONED AIR AND REFRIGERATION
CO., a corporation, et al., Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

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San Francisco 5, California.

For Appellees:

ROTH & BAHRs,

351 California Street,
San Francisco 4, California,

PAUL K. DOTY,

415 T. W. Patterson Bldg.,
Fresno 21, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court, Southern
District of California, Northern Division

No. 1517—ND

CONDITIONED AIR AND REFRIGERATION
CO., a California corporation; BELL AND
HUGHES, INC., a California corporation;
BAIRD SHEET METAL, a California cor-
poration; EARL GRIFFITH AND JOHN
DYER, a co-partnership doing business under
the name of GRIFFITH AND DYER,
Plaintiffs,

vs.

PLUMBING AND PIPEFITTING LABOR-
MANAGEMENT RELATIONS TRUST;
LOCAL UNION No. 246 OF THE UNITED
ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE
UNITED STATES AND CANADA; PIPE
TRADES DISTRICT COUNCIL No. 36 OF
THE UNITED ASSOCIATION OF JOUR-
NEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPEFITTING INDUS-
TRY OF THE UNITED STATES AND
CANADA; VALLEY GROUP NEGOTIAT-
ING COMMITTEE; and PAUL L. REEVES,
Defendants.

COMPLAINT FOR INJUNCTION

As and for a first cause of action, plaintiffs allege
as follows:

I.

This action arises under the provisions of Section 302 subsections (a) and (b) of the Labor Management Relations Act, 1947, as amended (hereinafter referred to as LMRA 1947) as hereinafter more fully appears. (29 U.S.C. Section 186.) [2]

II.

Jurisdiction of this action is conferred upon this Court by the provisions of Section 302 subsection (e) LMRA 1947.

III.

Plaintiffs Conditioned Air and Refrigeration Co., Bell and Hughes Inc., Baird Sheet Metal, are corporations organized and existing under and by virtue of the laws of the State of California; Earl Griffith and John Dyer is a co-partnership doing business under the name of Griffith and Dyer.

IV.

Plaintiffs are engaged in an industry affecting commerce within this district, and plaintiffs are employers of employees employed in an industry affecting commerce within the meaning of Section 302 LMRA 1947.

V.

Defendants Plumbing and Pipefitting Labor-Management Relations Trust, hereinafter referred to as "Trust"; Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter referred to as "Lo-

cal Union No. 246"; Valley Group Negotiating Committee, hereinafter referred to as "Valley Group"; and Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, hereinafter referred to as "Pipe Trades", are representatives of employees who are employed in an industry affecting commerce within the meaning of Section 302 LMRA 1947, and said "Trust" and "Local Union No. 246" and "Valley Group" and "Pipe Trades" are representatives of the employees of plaintiffs.

Said "Trust" was organized and established in February 1954. [3]

Defendants "Trust", "Local Union No. 246", "Valley Group" and "Pipe Trades" and each of them maintain their principal offices in Fresno, California, within this district, and the duly authorized officers and agents of each of said defendants are engaged in representing and acting for the employee members of said defendants in Fresno, California, within this district.

Defendant Paul L. Reeves is an officer and managing agent, to wit, Business Manager of "Local Union No. 246", and is an officer and managing agent of "Valley Group" and "Pipe Trades".

VII.

Defendants are attempting to compel plaintiffs to pay and deliver money and other things of value to defendant "Trust", and have threatened to, and will, unless restrained by this Court, cause the

aforesaid employees of plaintiffs to strike and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value to defendant "Trust".

VIII.

That neither said money nor other thing of value were or are to be used or applied for any of the purposes specified in Section 302 (c) LMRA 1947.

IX.

That said acts of said defendants, unless enjoined and restrained, will cause substantial and irreparable injury to plaintiffs for which no adequate remedy exists at law.

As and for a second, separate and distinct cause of action plaintiffs allege:

I.

Plaintiffs hereby adopt and incorporate by reference thereto as though fully set forth herein all the allegations of paragraphs I to VI, inclusive, and paragraphs VIII and IX of the First Cause of Action set forth herein. [4]

II.

Defendants are attempting to compel plaintiffs to pay and deliver money and other things of value to defendant "Local Union No. 246", and have threatened to, and will, unless restrained by this Court, cause the aforesaid employees of plaintiffs to strike and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and

other things of value to defendant "Local Union No. 246".

As and for a third, separate and distinct cause of action plaintiffs allege:

I.

Plaintiffs hereby adopt and incorporate by reference thereto as though fully set forth herein all the allegations of paragraphs I to VI, inclusive, and paragraphs VIII and IX of the First Cause of Action set forth herein.

II.

Defendants are attempting to compel plaintiffs to pay and deliver money and other things of value to defendant "Valley Group", and have threatened to, and will, unless restrained by this Court, cause the aforesaid employees of plaintiff to strike and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value to defendant "Valley Group".

As and for a fourth, separate and distinct cause of action plaintiffs allege:

I.

Plaintiffs hereby adopt and incorporate by reference thereto as though fully set forth herein all the allegations of paragraphs I to VI, inclusive, and paragraphs VIII and IX of the First Cause of Action set forth herein. [5]

II.

Defendants are attempting to compel plaintiffs

to pay and deliver money and other things of value to defendant "Pipe Trades", and have threatened to, and will, unless restrained by this Court, cause the aforesaid employees of plaintiff to strike and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value to defendant "Pipe Trades".

As and for a fifth separate and distinct cause of action against defendants, plaintiffs allege as follows:

I.

Plaintiffs hereby adopt and incorporate by reference thereto as though fully set forth herein all the allegations of the First, Second, Third and Fourth Causes of Action set forth herein.

II.

That pursuant to, and in compliance with, the demands and threats of defendants, plaintiff Conditioned Air And Refrigerator Co. has paid the sum of Ninety-three dollars and twenty-five cents (\$93.25) to defendants since May 1, 1955. Plaintiff Bell and Hughes, Inc. has paid the sum of Three hundred thirty dollars and sixty-seven cents (\$330.67) to defendants since May 1, 1955. Plaintiff Griffith and Dyer has paid the sum of Two hundred sixty-five dollars and twenty-five cents (\$265.25) to defendants since May 1, 1955. Plaintiff Baird Sheet Metal has paid the sum of Twelve dollars and eighty cents (\$12.80) to defendants since May 1, 1955.

Wherefore, plaintiffs pray that defendants be

enjoined and restrained from attempting to cause plaintiffs or any of them to pay any money or thing of value to defendants "Trust", "Local Union No. 246", "Valley Group" or "Pipe Trades", or any of them, and that said "Trust", "Local Union No. 246", "Valley Group" and "Pipe Trades", and each of them, be restrained and enjoined from [6] receiving or accepting any money or thing of value from plaintiffs. That defendants be ordered and directed to repay and return all moneys or things of value paid or delivered to defendants by plaintiffs or received and accepted by defendants from plaintiffs, and for such other relief as to the Court may seem just and proper and for plaintiffs' costs incurred herein.

/s/ ALMON E. ROTH,

/s/ GEORGE O. BAHRs,

/s/ PAUL K. DOTY,

Attorneys for Plaintiffs. [7]

[Endorsed]: Filed Aug. 22, 1955.

[Title of District Court and Cause.]

ANSWER

Comes Now defendant, Plumbing and Pipefitting Labor-Management Relations Foundation, formerly known as Plumbing and Pipefitting Labor Management Relations Trust; Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; Pipe Trades District

Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; and Paul L. Reeves, and jointly and severally answer plaintiff's Complaint for Injunction [8] as follows:

First Defense

1. The Complaint fails to state a claim against defendants, or any of them, upon which relief can be granted.

Second Defense

1. Defendants, and each of them, deny the allegations contained in Paragraphs I, II, and IV of the complaint.

2. With respect to Paragraph V of the complaint:

(a) Defendants, and each of them, deny that the Plumbing and Pipefitting Labor Management Relations Foundation is a "representative of employees who are employed in an industry affecting commerce within the meaning of Section 302 L.M.R.A. 1947" (29 U.S.C. 186) or at all.

(b) Defendants, and each of them, admit that Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is a representative of employees, but deny that as to the employees here involved it is a "representative of employees who are in an industry affecting commerce within the meaning of Section 302 L.M.R.A. 1947" (29 U.S.C. 186) or at all.

(c) Defendants and each of them, admit that Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is as to the employees here involved a representative of employees within the meaning of Section 302 L.M.R.A. 1947" (29 U.S.C. 186), and that its predecessor, Valley Group Negotiating Committee, was such a representative, but deny that it is and that its predecessor was as to plaintiff: employees "a representative of employees who are employed in an industry affecting commerce within the meaning of Section 302 L.M.R.A. 1947" (29 U.S.C. 186).

(d) Defendants, and each of them, deny that the [9] duly authorized officers and agents of each of the answering defendants, or any of them, including Paul L. Reeves, are engaged in representing employees of plaintiffs in Fresno, California, within the meaning of Section 302 L.M.R.A. 1947 (29 U.S.C. 186), or at all.

3. Defendants, and each of them, deny the allegations contained in Paragraph VII and VIII of the complaint.

4. Defendants, and each of them, deny the allegations in Paragraph IX.

5. Defendants, and each of them, with respect to the Paragraphs of the complaint incorporated by reference in plaintiff's Second, Third and Fourth causes of action, adopt and incorporate by reference

Paragraphs 1 through 4 of this Second Defense as if set forth in full herein.

6. Defendants, and each of them, with respect to Paragraph II of the plaintiff's Second, Third and Fourth causes of action, deny the allegations in each said Paragraph II in each said cause of action.

7. Defendants, and each of them, with respect to the paragraphs of the complaint incorporated by reference, Paragraph I of plaintiff's Fifth cause of action adopt and incorporate by reference Paragraphs 1 through 6 of this Second Defense as if set forth in full herein.

8. Defendants, and each of them, deny the allegations contained in Paragraph II of plaintiff's Fifth cause of action, and allege the true facts to be that money has been paid by the plaintiffs, and each of them, to Plumbing and Pipe Fitting Labor-Management Relations Foundation under and pursuant to the terms and conditions of Legitimate Collective Bargaining Agreements binding upon plaintiffs, and each of them.

Third Defense

1. That the plaintiffs, and each of them, separately and individually, entered into a Collective Bargaining Agreement [10] with the Valley Group Negotiating Committee dated July 20, 1952; that said Collective Bargaining Agreements provide amongst other things:

“Section 1: Definitions.

“(B) The term ‘Union’ as used in this agreement means the Valley Group Negotiating Committee acting as the agent of Local Unions No. 62, 228, 246, 365, 437, 447, 460, 492, 503, and 607 of the United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada.”

And thereafter:

“Section 4. Recognition of Bargaining Agents
Union Recognized As Collective Bargaining Representative of Employees.

The Employer, Employer Associations and the Individual Employers recognize the Union as the sole and exclusive collective bargaining representative of all employees of the Individual Employers performing work covered by this agreement.”

2. That the plaintiffs, and each of them, separately and individually entered into a collective bargaining agreement with the Valley Group Negotiating Committee dated July 20, 1953, with the exception of the agreement of plaintiff, Baird Sheet Metal, which is dated August 29, 1953.

The said Collective Bargaining Agreements provide amongst other things:

“Section 1: Definitions.

“(B) The term ‘Union’ as used in this agreement means the Valley Group Negotiating Committee acting as the agent of Local Unions

14 *Plumbing & Pipe Fitting, Etc., et al.,*

No. 62, 228, 246, 265, 437, 447, 460, 492, 503, 607 and 662 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.”

And thereafter:

“Section 4: Recognition of Bargaining Agents.
“(A) The Individual Employers recognize the Union as the sole and exclusive collective bargaining representative of all employees [11] of the Individual Employers performing work covered by this Agreement.”

3. That the plaintiffs, and each of them, separately and individually entered into a Collective Bargaining Agreement amending the 1953 Collective Bargaining Agreement last above in Paragraph 2 of this defense referred to.

That said 1954 Amended Collective Bargaining Agreement amending said 1953 Collective Bargaining Agreement did not change the Definition or Recognition Paragraphs set out in Paragraph 2 of this defense.

That said 1954 Amended Collective Bargaining Agreement did provide amongst other things as follows:

“Add Section 15 (a) to Master Contract:

“(A) Where a labor-management set up exists by agreement between the Local Master Plumbers Association, regardless of its name or organization, and a Local Union affiliated with

the Committee requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local, make the required payment or payments."

4. That said 1954 Amended Collective Bargaining Agreement was terminated in the manner and form provided by Section 8 (d) L.M.R.A. 1947 (29 U.S.C. 158) and a new 1955 Collective Bargaining Agreement was negotiated in the manner and form provided by said Section 8 (d) L.M.R.A. 1947, a copy of which is attached hereto, made a part hereof as if set forth in full herein, and marked Exhibit A.

5. Defendant, Pipe Trades District Council No. 36, has requested plaintiffs, and each of them, individually, to execute said agreement in keeping with past practice.

6. Plaintiffs, and each of them, individually, have refused to execute said Collective Bargaining Agreement, solely because of the inclusion therein of "Section 16: Labor Management Relations." [12]

7. Defendant, Pipe Trades District Council No. 36 is prepared and is willing to negotiate with said plaintiff employers concerning the terms and conditions of a collective bargaining agreement; however, Pipe Trades District Council No. 36 as the collective bargaining representative of the employees of plaintiffs, and each of them, covered by the 1952, 1953 Collective Bargaining Agreement and

1954 Amendment to the 1953 Collective Bargaining Agreement is prepared to cause said employees to strike to obtain the inclusion of said Section 16 of Exhibit A in a Collective Bargaining Agreement with said plaintiffs, and each of them.

8. That the Valley Group Negotiating Committee, predecessor to Pipe Trades District Council No. 36, caused the said employees covered by the said 1953 Collective Bargaining Agreement to strike to obtain the 1954 Amended Collective Bargaining Agreement with plaintiffs, and each of them, including a Labor-Management clause, the clause Section 15(a) quoted in Paragraph 3 of this defense.

9. That as a result of said strike said plaintiffs filed with the 20th Region of the National Labor Relations Board an Unfair Labor Practice Charge dated June 6, 1955, and numbered herein 20-CB-404, against defendants Local Union No. 246 and Paul L. Reeves, charging amongst other things a violation of Section 8 (b) 3 L.M.R.A. 1947 (29 U.S.C. 158 (6) 3) i.e. that said defendants by striking to obtain the inclusion of said clause Section 15(a) in said 1954 Amended Collective Bargaining Agreement had refused to bargain collectively with the plaintiffs.

10. That on July 18, 1955, said plaintiffs were notified by the Regional Director of the 20th Region of the National Labor Relations Board that after carefully investigating the charge he was refusing to issue a Complaint.

11. That said subject matter, i.e., a Labor-Man-

agement setup, is a legitimate subject for collective bargaining between [13] employers and employees.

Fourth Defense

1. That on the 9th day of February, 1955, there was created by a trust indenture, in writing, the "Plumbing and Pipe Fitting Labor-Management Relations Trust."

That on the 2nd day of August, 1955, said trust indenture was amended in the manner and form provided for in said trust indenture of February 9, 1955.

That attached hereto and made a part hereof as if set forth in full herein is a copy of the trust indenture of February 9, 1955, and marked Exhibit "B," and a copy of the first and only amendment thereto, dated August 2, 1955, and marked Exhibit "C".

2. That all payments required to be made by employers for hours worked by reason of Section 15(a) of the 1954 Amended Collective Bargaining Agreement not yet executed by plaintiffs, Exhibit "A," are required to be made to said Plumbing and Pipe Fitting Labor-Management Relations Foundation.

3. That the Plumbing and Pipefitting Labor-Management Relations Foundation was created jointly by the Associated Plumbing Contractors of Central California, Inc., a California corporation, an incorporated association of Individual Employers licensed contractors under the laws of the State of California and Individual Employers not mem-

bers of said association, licensed contractors under the laws of the State of California and defendant Local Union No. 246, an unincorporated association, a labor organization.

4. That said Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust, is a legal entity separate and distinct from its creators, i.e., Trustors, from the representative of the employees here involved, the Individual Employers, the employees of the Individual Employers, the association of Employers, and the Local Union that created it, and the beneficiaries of the [14] trust.

5. That by reason of the fact that the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust, is a legal entity, a juridicial personage, separate and apart from plaintiffs and defendants, it is not now and never has been the representative of any employees, including plaintiffs' employees, within the meaning of Section 302 L.M.R.A. 1947 (29 U.S.C. 186) or at all.

Fifth Defense

1. That amongst other things the Foundation is authorized by the trust indenture "to enforce the collective bargaining agreements and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada." (Exhibit B).

2. That amongst other things the 1955 Collective Bargaining Agreement, not yet executed by

plaintiffs, provides for a method of arbitration of industrial disputes between employees and Individual Employers, and any of the parties to or covered by the Collective Bargaining Agreement and as a part thereof provides:

“Section 17: Joint Conference Board.

“(A) In those areas in which labor-management set ups exist, such labor-management set up shall function as a Joint Conference Board with all the powers, rights, duties and obligations hereinafter lodged in the Joint Conference Board.”

3. That said arbitration provisions are specifically enforceable under and pursuant to Sections 1280 through 1293 of the Code of Civil Procedure of the State of California by employees and Individual Employers and any of the parties to or covered by the Collective Bargaining Agreement.

4. That by reason of said arbitration provision and others in said trust indenture, Exhibits “B” and “C,” it is not [15] within the power of the trust to act as a representative of any employees, including plaintiffs’ employees within the meaning of Section 302 L.M.R.A. 1947 (29 U.S.C. 186) or at all, and therefore is not now and has not been and cannot be such a representative.

Sixth Defense

1. That the provisions of the 1954 Amended Collective Bargaining Agreement, Section 15 (a) and the provisions of the 1955 Collective Bargaining

Agreement, Section 16, Exhibit "A," not yet executed by plaintiffs, or any of them, are the only provisions requiring payment to the Plumbing and Pipefitting Labor-Management Relations Foundation.

2. That in addition said agreements provide for payments to the employees directly by way of wages, overtime, travel and subsistence. That all said agreement provide for the payment by the employer into a Health and Welfare Trust. That the 1954 Amended Collective Bargaining Agreement provides in addition for payments into a Pension Trust. That the 1955 Collective Bargaining Agreement provides for payment into a Pension Trust, and in addition an Apprentice Training Trust. All such payments are for hours worked by employees of Individual Employers.

3. That no agreement provides for any payment to the Valley Group Negotiating Committee, Pipe Trades District Council No. 36, Local Union No. 246, or the business manager, or any officer, agent or employee of said District Council or Local Union.

4. That no demand has been made on plaintiffs, or any of them, or any other employer at any time prior to the date of this Answer and none is now made, and none will be made by Pipe Trades District Council No. 36, Local Union No. 246, Paul L. Reeves, or any officer, agent or employee of said District Council or Local Union that any employer pay or deliver or agree to pay or deliver, any money or other thing of value to them or any of them.

5. That demand has been made and will be made that [16] plaintiffs and other employers of employees represented by Pipe Trades District Council No. 36 agree to pay and pay for hours worked by such employees, into a trust, to-wit: the Plumbing and Pipefitting Labor-Management Relations Foundation, a trust, such amount for each hour worked as may be negotiated in collective bargaining with plaintiffs, and each of them, and other employers of employees represented by District Council No. 36.

Wherefore, defendants and each of them, pray that plaintiffs' complaint be dismissed and they go hence with their costs and the costs of each of them.

/s/ P. H. McCARTHY, JR.,
Attorney for Defendants, and each
of them.

Acknowledgment of Service Attached. [17]

EXHIBIT "B"

Plumbing and Pipe Fitting Labor-Management Relations Trust

This Trust Agreement, made and enter into this day of February, 1954, by and between Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, a Trustor, hereinafter referred to as "Union" and the Associated Plumbing Contractors of Central

EXHIBIT "B"—(Continued)

California, Inc. and Individual Employers regularly engaged in the plumbing and pipe fitting industry who hold one or more contractor license, C-14, C-16, C-20, C-27, C-36, C-38, C-42, C-57 and C-61 issued by the Contractors' State License Board of California, Trustors, hereinafter referred to as "Employer", recites and provides as follows:

Whereas, Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and the Associated Plumbing Contractors of Central California, Inc. and various Individual Employers not members of said Association are desirous of forming and perfecting an organization for the purpose of improving the relations between the employers and employees making up the Plumbing and Pipe Fitting Industry, and the Plumbing and Pipe Fitting Industry and the general public, and to enforce the collective bargaining agreement and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship, and [19]

Whereas, there is presently no effective machin-

EXHIBIT "B"—(Continued)

ery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor or improper work and workmanship, and

Whereas, the absence of such effective machinery is producing chaos in the Plumbing and Pipe Fitting Industry and is endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confidence of the public in the employers and in the plumbing and pipe fitting industry.

Now, Therefore, to correct this situation, to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees, to restore the trust and confidence of the public in the employers and the plumbing and pipe fitting industry, this Trust is created.

Article I.

Section 1. There is hereby created the "Plumbing and Pipe Fitting Labor-Management Relations Trust", hereinafter referred to as "Trust."

Section 2. The Trust shall have its principal office at such place as the Board of Trustees shall from time to time designate.

Article II.

Section 1. The Trust shall be administered by a Board of Trustees which shall consist of five (5)

EXHIBIT "B"—(Continued)

Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. and five (5) Trustees appointed by the Union.

Section 2. The Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. shall be appointed in writing and shall serve at the pleasure of said Associated Plumbing Contractors of Central California, Inc. The Trustees [20] appointed by the Union shall be appointed by the Union in writing and serve at the pleasure of said Union. Each original Trustee shall sign this Trust Agreement or a duplicate thereof, and such signature shall constitute his acceptance of office.

Section 3. The Trustees shall select one of their number to act as Chairman of the Board of Trustees and one to act as Co-Chairman, to serve for such period as the Trustees shall determine. When the Chairman is selected from among the Trustees appointed by the Associated Plumbing Contractors of Central California, Inc., the Co-Chairman shall be selected from the Union appointed Trustees and vice versa.

Section 4. Each Trustee shall serve until his death, resignation or removal from office.

Section 5. Any Trustee may resign at any time by serving written notice of such resignation upon the Chairman and Co-Chairman of the Board of Trustees at least 15 days prior to the date on which such resignation is to be effective.

Section 6. Any Trustee may be removed from his office at any time, for any reason, by the party

EXHIBIT "B"—(Continued)

appointing him, by notice in writing served upon the Chairman and Co-Chairman of the Board of Trustees, with a copy mailed to the Trustee so removed.

Section 7. If any Trustee dies, resigns or is removed from office, a successor Trustee shall be appointed forthwith by the party or parties who appointed the predecessor Trustee, by notice in writing served upon the Chairman and Co-Chairman of the Board of Trustees. The successor Trustee so appointed shall sign this Trust Agreement, or a duplicate thereof, and such signature shall constitute his acceptance of office.

Section 8. Any Trustee who resigns or is removed from office shall forthwith turn over to the Chairman and Co-Chairman of the Board of Trustees at the principal office of the Trust any and all records, books, documents, moneys and other property in his possession or under his control which [21] belong to the Trust or pertain to its administration.

Article III.

Section 1. Each Individual Employer, a member of the Associated Plumbing Contractors of Central California, Inc., and each Individual Employer not a member of the Associated Plumbing Contractors of Central California, Inc. holding one or more said contractor's license C-4, C-16, C-20, C-27, C-36, C-38, C-42, C-57 and C-61 who is signatory to this Trust Instrument or who agrees in any manner to be bound by this Trust Instrument shall pay into

EXHIBIT "B"—(Continued)

this Trust and to the Board of Trustees thereof ten (\$0.10) cents per hour for each hour worked, by each such Individual Employer who works with the tools of the trade while working with the tools of the trade and by each journeyman and apprentice employed by each such Individual Employer on work within the work jurisdiction of the United Association of Journeymen and Apprentices of the Pipe Fitting Industry of the United States and Canada performed within the Counties of Fresno, Madera, Kings and Tulare of the State of California, provided however that the Board of Trustees have the power and authority to extend the territorial coverage of this Trust on such terms and conditions as the Board of Trustees deem proper.

Section 2. This Trust shall consist of all payments required to be made by Section 1 of this Article and any amendment thereof and any agreement between the Union and the Associated Plumbing Contractors of Central California, Inc. or any other employer association or any Individual Employer holding one or more said Contractor's license C-4, C-16, C-20, C-27, C-36, C-38, C-42 and C-61, and all interest, income and other returns thereon of any kind whatsoever.

Section 3. Neither the Employer, any Individual Employer, the Unions, any individual employee nor any other beneficiary shall have any right, title or interest in the Trust other than as specifically provided in this agreement, and no part of said fund [22] shall revert to the Employer or any Individ-

EXHIBIT "B"—(Continued)

ual Employer. Neither the Trust nor any payments to the Trust shall be in any manner liable for or subject to the debts, contracts or liabilities of Employer or Union or of any Individual Employer, or any individual employee.

Section 4. Neither the Employer, nor any officer, agent, employee or committee member of the Employer, shall be liable to make payments into the Trust or be under any other liability to the Trust except to the extent that he may be an Individual Employer required to make payments to the Trust with respect to his own individual operations, or to the extent he may incur liability as a trustee as hereinafter provided. The liability of any Individual Employer to the Trust shall be limited to the payments required by this Trust with respect to his or its individual operations, and in no event shall he or it be liable or responsible for any portion of the payments due from other Individual Employers with respect to the operations of such Individual Employers.

Section 5. Neither the Employer, any Individual Employer, the Union nor any individual employee shall be liable or responsible for any debts, liabilities or obligations of the Trust or the Board of Trustees.

Section 6. Neither the Union, nor any member, officer, agent, employee or committee member of the Union shall be liable to make payments into the Trust or be under any other liability to the Trust except to the extent that he may incur liability as

EXHIBIT "B"—(Continued)

an Individual Employer or as a trustee as herein provided, or both.

Article IV.

Section 1. Subject only to the limitations hereinafter set out the Board of Trustees are authorized to and shall have the power to pay out the assets of this Trust to any person, firm, corporation, association whether incorporated or unincorporated or trust at their sole and exclusive discretion for the general [23] welfare of the Plumbing and Pipe Fitting Industry and without in any way limiting the foregoing for the purpose of improving the relations between employers and employees making up the Plumbing and Pipe Fitting Industry, and the general public and to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry, to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship, to enforce the collective bargaining agreements and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

Section 2. The Board of Trustees shall also have the power to demand, collect, receive and hold all payments of money to be paid or paid by the Individual Employer, in accordance with this Trust and any other agreement. Said payments shall be due

EXHIBIT "B"—(Continued)

and payable at such place or places, at such times and in such installments as the Board shall from time to time direct. Each payment shall be accompanied by a statement in such form as the Board of Trustees may require.

Section 3. The Board of Trustees shall also have the right at all reasonable times through its officers, agents, servants and employees authorized and directed so to do to examine the books and accounts of all Individual Employers required by this Trust Agreement or any other agreement to make payments into this Trust.

Section 4. The Board of Trustees shall also have the power to enforce the payment of payments to the Trust by Individual Employers under the terms of this Trust or under any other promise to make such payments. If any Individual Employer defaults in the making of such payments and if the Board of Trustees consults legal counsel with respect thereto, or files any suit or [24] claim with respect thereto, there shall be added to the obligation of the Individual Employer who is in default, reasonable attorneys' fees, court costs and all other reasonable expenses incurred by the Board of Trustees in connection with such default.

Section 5. The Board of Trustees shall also have power:

(A) To establish and accumulate such reserve funds as may be necessary to provide for administration expenses and other proper obligations of the Trust.

EXHIBIT "B"—(Continued)

(B) To employ such executive, administrative, accounting, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the carrying out of the Trust and to pay or cause to be paid, out of the Trust the compensation and expenses of such personnel and assistants, the cost of office space, furnishings and supplies and other expenses of the Trust.

(C) To consult with and secure the advice of legal counsel on any question of fact or law arising in connection with the carrying out of the Trust, and to employ legal counsel in connection with suits or claims by or against the Board of Trustees or the Trust with respect to the Trust, and to pay the reasonable cost of such legal services from the Trust.

(D) To incur and pay out of the Trust any other expense reasonably incidental to the establishment and administration of the Trust.

(E) To invest and reinvest such portion of the Trust as is not required for current expenditures and charges.

Section 6. The Board of Trustees shall deposit all moneys received by them in such bank or banks as they may select for that purpose. All withdrawals of moneys from such bank or banks shall be made only by check, signed by a person or persons authorized by the Board of Trustees to sign and countersign.

Section 7. The Board of Trustees shall by reso-

EXHIBIT "B"—(Continued)

lution duly adopted, provide for fidelity bonds with such companies and in [25] such amounts as they may determine, for Trustees or other persons who shall be authorized to receive or withdraw money from or for the Trust. The cost of such bonds shall be a proper charge against the Trust.

Section 8. The books of account and records of the Board of Trustees, including the books of account and records pertaining to the Trust, shall be audited at least once each year by a qualified Public Accountant or Certified Public Accountant licensed under the laws of the State of California and selected by the Board of Trustees. The Board of Trustees shall also make all other reports required by law. A statement of the results of the annual audit shall be available for inspection by interested persons at the principal office of the Trust and at such other suitable place as the Board of Trustees may designate from time to time. Copies of such statement shall be delivered to the Employer, the Union and each Trustee within five days after the statement is prepared. The expense of such audit shall be borne by the Trust.

Section 9. The Board of Trustees has no authority or power to engage or attempt to engage in any "Prohibited Transaction" as defined in Section 23736.1 of the Revenue and Taxation Code of the State of California.

Article V.

Section 1. The Board of Trustees shall appoint

EXHIBIT "B"—(Continued)

a secretary who shall keep minutes of all meetings and records of all proceedings and acts of the Board of Trustees. The minutes shall be signed by the Chairman and Co-Chairman of the Board.

Section 2. The Board of Trustees shall determine the time and place for regular periodic meetings of the Board of Trustees, with or without notice as the Board may from time to time determine. Either the Chairman or the Co-Chairman, or any two members of the Board of Trustees, may call a meeting of the Board of Trustees giving written notice to all other trustees of the time [26] and place of such meeting mailed at least four calendar days before the date set for the meeting.

Section 3. To constitute a quorum at any regular or special meeting of the Board of Trustees, there must be present at least three (3) of the total number of Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. on the Board of Trustees and three (3) of the total number of Union appointed Trustees on the Board of Trustees. In the determination of any matter coming before the Board of Trustees for consideration, the Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. shall have one vote, as a group or unit and not otherwise, and the Union appointed Trustee shall have one vote, as a group or unit and not otherwise. The vote of each group or unit shall be controlled by a majority within such group or unit.

Section 4. All meetings of the Board of Trustees

EXHIBIT "B"—(Continued)

shall be held at the principal office of the Trust unless another place is designated from time to time by the Board of Trustees.

Section 5. The Board of Trustees may act through a committee or committees appointed by them from time to time. Each such committee shall be composed of an equal number of Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. and the Union and shall consist of not less than two Trustees.

Section 6. Upon any matter which may properly come before the Board of Trustees, it may act in writing without a meeting, provided such writing is signed by three (3) of the Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. and three (3) of the Union appointed Trustees.

Article VI

Section 1. No party dealing with the Board of Trustees, or any of them, shall be obligated to see to the application of any moneys or property of the Trust, or to see that the terms of this [27] Agreement have been complied with, or to inquire as to the necessity or expediency of any act of the Board of Trustees. Every instrument executed by the Board of Trustees, or by its direction, shall be conclusive in favor of every person who relies on it, that:

A. At the time of the delivery of the instrument this Trust Agreement was in full force and effect.

EXHIBIT "B"—(Continued)

B. The instrument was executed in accordance with the terms and conditions of this Agreement.

C. The Board of Trustees was duly authorized to execute the instrument or direct its execution.

Section 2. The duties, responsibilities, liabilities and disabilities of the Board of Trustees or any Trustee shall be determined solely by the express provisions of this Agreement and no further duties, responsibilities, liabilities or disabilities shall be implied.

Section 3.

(A) The Board of Trustees shall incur no liability in acting upon any papers, documents, data or information believed by it to be genuine. The Board of Trustees shall incur no liability for any act based upon an opinion of legal counsel.

(B) The Board of Trustees may delegate any of its ministerial powers or duties to any agent or employee.

(C) A trustee shall be liable only for wilful misconduct. No trustee shall be liable for the act or omission of any other trustee. The Trust shall exonerate, reimburse and save harmless the Board of Trustees, individually and collectively, against any and all expenses and liabilities arising out of the trusteeship, except (as to the individual trustee or trustees directly involved) for liabilities arising out of wilful misconduct.

(D) The Board of Trustees shall not be liable for the acts or omissions of the Employer or any Individual Employer signatory hereto, or the Union signatory hereto.

EXHIBIT "B"—(Continued)

Section 4. Neither the Employer, the Individual Employers, the Union nor any of the Trustees shall be responsible or liable for: [28]

(A) The validity of this Trust Agreement.

(B) The making or retention of any deposit or investment of the Trust or any portion thereof, or the disposition of any such investment, or for any loss or diminution of the Trust, except, as to the particular person involved, such loss as may be due to wilful misconduct of such person.

Section 5. Neither the Employer, any Employer association or Individual Employer represented by Employer, any employer representative nor the Union or any Union Representative or member or employee represented by the Union shall be liable in any respect for any of the obligations of the Board of Trustees because any Trustee member or members are in any way associated with any such Employer, Employer Association, Individual Employer or Union.

Section 6. The Trustees shall be reimbursed out of the Trust for expenses incurred by them in attending meetings or in the performance of any other duty or act pursuant to this Agreement in such amount as the Board of Trustees may from time to time determine. No Trustee shall receive any fee for his services as a Trustee, provided however, that nothing herein contained to the contrary shall prevent or impede the employment by the Board of Trustees of any Trustee or the payment of any sum to or for any Trustee for services other than as Trustee.

EXHIBIT "B"—(Continued)

Article VII.

Section 1. Any Individual Employer who is not a member of Associated Plumbing Contractors of Central California, Inc. or signatory hereto may become a party to this Agreement in such manner as the Board of Trustees may from time to time determine.

Section 2. Upon becoming a party to this Agreement, any such Individual Employer assumes all of the obligations imposed by the agreement upon the Individual Employer, is entitled to all rights [29] under the agreements and is otherwise subject to it in all respects.

Article VIII.

Section 1. Any notice required to be given under the terms of this Agreement shall be deemed to have been duly served if delivered personally to the person to be notified in writing, or if mailed in a sealed envelope, postage prepaid, to such person at his last known address as shown in the records of the Trust, or if sent by wire to such person at said last known address.

Section 2. This Agreement shall be binding upon the heirs, executors, administrators, successors, purchasers and assigns of the Employer, any Individual Employer, the Union and the Board of Trustees.

Section 3. All questions pertaining to this Agreement, the Trust and their validity, administration and construction, shall be determined in accordance with the laws of the State of California and with any pertinent laws of the United States.

EXHIBIT "B"—(Continued)

Section 4. If any provision of this Trust Agreement, or any step in the administration of the Trust is finally held to be illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining portions of the agreement, unless such illegality or invalidity prevents accomplishment of all of the objectives and purposes of the agreement. In the event of any such holding, the appropriate parties will adopt a valid provision to take the place of the provision declared illegal or invalid.

Article IX.

Without limitation of the general authority herein granted, the Board of Trustees may agree to do or do any one or more of the following:

(A) Direct that all or any part of the assets of this Trust be paid into a joint trust account, to be known as the Valley Group Plumbing and Pipe Fitting Industry Labor-Management Relations [30] Trust, for such period or periods as the Board of Trustees may specify by resolution from time to time.

(B) Establish a Board of Administrative Trustees, consisting of an equal number of Trustees appointed by the Plumbing Contractors Association and Union appointed Trustees selected from among the Trustees of the participating trusts, and delegate and grant to such administrative Board all or any portion of the powers and duties of the Board of Trustees established by this Trust Agreement.

EXHIBIT "B"—(Continued)

The responsibilities and liabilities of the members of the Administrative Board with respect to said joint arrangement shall be identical with the responsibilities and liabilities of the Trustees appointed pursuant to this Agreement.

(C) Amend, modify or terminate any such joint arrangement. Such amendment, modification or termination may be made at any time, and from time to time, subject to any restriction imposed by the agreement establishing the joint arrangement and any contractual commitments made by the Board of Administrative Trustees.

(D) Incorporate by reference any one or more of the provisions of this Agreement into the agreement establishing such joint arrangement.

Article X.

Section 1. The provisions of this Trust Agreement may be amended or modified at any time, or from time to time by mutual agreement between the Union and the Associated Plumbing Contractors of Central California, Inc.

Section 2. This Agreement shall be effective as of March 1, 1954.

Section 3. In the event this Trust shall terminate for any reason, the funds in the hands of the Trustees shall be expended for the purposes herein provided for or delivered to any organization [31] organized for any or all of the purposes for which this Trust is organized.

DATED: 9th day of February, 1954.FOR THE EMPLOYER:

ASSOCIATED PLUMBING CONTRACTORS
OF CENTRAL CALIFORNIA, INC.
300 BLACKSTONE
FRESNO, CALIFORNIA

Maxley Newman

*Employer's
Trustees*

Maxley Newman

Charles Young

Donald G. Smith

Robert F. Clendy

Paul J. Clendy

Individual

Employers

Ludwig Hantz

Wm. H. Hantz

Edward Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

FOR THE UNION

Plumbing & Sheet Metal Workers L. A. 246

By Paul L. Revels

Ex. Shipman

Phil F. Jones

Bruce M. Chapman

L. D. Turner

Paul L. Revels

Trustees

Francis Jennings & Sons, Inc.

Martin K. Kuchner

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

Wm. Hantz

1/eng. Gar-muced
By P. Gardin

By *W. H. Gardner*

Seena Plumbing Shop
By P. W. McKelvey

By A. L. C. J. M.

Lucie Walker

Keller Plumbing Co.

Wm. Hays Clumbey & Headings

Wm. - K. Hayes

Best Bunting Co

Mr. D. Craig

They are

W. H. Rogers—

Bratt Pils & Sheet Metal Shop

By Barry B. L.

Black, Pbg & S.W.C.

by Anna L. Henry

Clonal Expansion

Melvin A. Nelson

Carter x x Lord

Robert Carter

H. D. Carter
241 E. Plumking Shop -

Detached for
G. L. Davis: —

June 3. 54

32 Geo. R. Owens.

*Roll Spring Plunk
to City of France
Page 26, 1954*

7 Copy of frame

28, 1959



EXHIBIT "C"

First Amendment to Plumbing and Pipe Fitting Labor-Management Relations Trust

It is hereby mutually understood and agreed this 2nd day of August, 1955 that the Trust Agreement, made and entered into the 9th day of February, 1954, by and between Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, a Trustor, hereinafter referred to as "Union" and the Associated Plumbing Contractors of Central California, Inc. and Individual Employers regularly engaged in the plumbing and pipe fitting industry who hold one or more contractor license, C-4, C-16, C-20, C-27, C-36, C-38, C-42, C-57 and C-61 issued by the Contractors' State License Board of California, Trustors, hereinafter referred to as "Employer", pursuant to the provisions of Section 1, Article X of said trust instrument creating the "Plumbing and Pipe Fitting Labor-Management Relations Trust" be and the same is hereby amended as follows, to-wit:

1. Section 1 of Article I is deleted and there is substituted in the place and stead thereof, the following:

Article I.

Section 1. There is hereby created the "Plumbing and Pipe Fitting Labor-Management Relations Foundation", hereinafter referred to as "Trust".

2. Section 1 of Article II is deleted and there is substituted in the place and stead thereof, the following: [34]

Article II.

Section 1. The Trust shall be administered by a Board of Trustees which shall consist of six (6) Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. and six (6) Trustees appointed by the Union.

3. Article VI (A) is added between Article VI and Article VII, reading as follows:

Article VI (A)

Arbitration

Section 1. In the event that the Board deadlocks on any matter subject to determination by the Board, the Trustees shall within five (5) calendar days thereafter agree upon a neutral person to serve as an impartial umpire to decide the dispute.

(A) By mutual agreement of the Trustees the dispute may be submitted to a Board of Arbitration consisting of the umpire and an equal number of representatives from each respective Trustee group. If such is done, the decision of a majority of this Board of Arbitration shall be final and binding upon each Trustee, the Board, the Union, the Association, Individual Employers and beneficiaries of this Agreement.

In the absence of such mutual agreement the dispute shall be submitted to the Impartial Umpire and the decision of the Impartial Umpire shall be final and binding upon each Trustee, the Board,

the Union, the Association, Individual Employers and the beneficiaries of this Agreement.

(B) Any matter in dispute and to be arbitrated shall be presented in writing to the Board of Arbitration or the Impartial Umpire, as the case may be.

If the Board of Trustees cannot agree upon a joint statement presenting said matter to arbitration, each group of Trustees shall prepare and state in writing their version of the dispute and the question or questions involved within five (5) calendar days after said disagreement.

In making its or his decision, the Board of Arbitration or Impartial Umpire shall be bound by the provisions of this Agreement, and the applicable [35] collective bargaining agreement, and shall have no authority to alter or amend the terms of any thereof.

The decision of the Board of Arbitration or the Impartial Umpire, as the case may be, shall be rendered in writing within ten (10) calendar days after the submission of the dispute for decision.

All other matters of procedure shall be as determined by the Impartial Umpire.

Section 2. If no agreement on an Impartial Umpire is reached within five (5) calendar days, or if the Impartial Umpire having been agreed upon, the dispute is not resolved in the manner and within the time provided or within such further time as the Board of Trustees may allow for either such purpose, on petition of either group of Trustees, an Impartial Umpire shall be appointed by

the United States District Court for the Southern District of California, Northern Division.

Section 3. No matter which is subject to arbitration under this Article, i.e. the administration of the Trust shall be subject to the grievance procedure or any other arbitration procedure provided in any collective bargaining agreement. No other matter subject to or excluded from the grievance procedure of any collective bargaining agreement shall be subject to arbitration under this Article.

Dated: This 2nd day of August, 1955.

For the Union: Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada,

By /s/ Paul L. Reeves.

For the Employer: Associated Plumbing Contractors of Central California, Inc.,

By /s/ A. W. Grenfell. [36]

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto for purposes of plaintiffs' and defendants' motions for summary judgment:

1. That during the calendar year 1955 plaintiff employers made direct purchases of goods and materials from outside the [37] State of California in the amounts set opposite their names. Plaintiffs made purchases in California of goods and materials originating outside the State of California in the amounts set opposite their names; and plaintiffs furnished services and materials to firms engaged in commerce in the amounts set opposite their names, to wit:

	Direct	Indirect	
	Purchases	Purchases	Services
Baird Sheet Metal Works	\$240,683.24	\$29,389.00	\$10,919.29
Bell and Hughes	127,472.19	68,109.92	46,372.66
Conditioned Air	213,351.25	199,589.16	45,681.06
Griffith-Dyer	161,464.15	47,032.06	49,018.24

2. That plaintiffs and each of them, separately and individually, entered into a collective bargaining agreement entitled "Master Contract of the Valley Group Negotiating Committee" dated July 20, 1952, a copy of which said agreement is attached hereto and made a part hereof as Exhibit "A".

3. That plaintiffs and each of them, separately and individually, entered into a collective bargaining agreement entitled, "Master Contract of the Valley Group Negotiating Committee", which said contract was dated July 20, 1953, with the exception of the plaintiff Baird Sheet Metal Works, the contract for which is dated August 29, 1953. A copy of said collective bargaining agreement is at-

tached hereto and made a part hereof as Exhibit "B".

4. That on or about the 9th day of February, 1954, Associated Plumbing Contractors of Central California, Inc., a California corporation, an incorporated association of individual employers licensed contractors under the laws of the State of California, and certain individual employers licensed contractors under the laws of the State of California, and defendant Local Union No. 246, an unincorporated association, a labor organization, made and entered into a trust indenture in writing [38] entitled, "Plumbing and Pipe Fitting Labor-Management Relations Trust". That on or about the second day of August 1955 the name of said trust was, by amendment, changed to "Plumbing and Pipe Fitting Labor-Management Relations Foundation". That Exhibit "B" attached to defendants' answer is a true copy of said trust indenture.

That on the second day of August said trust indenture was amended by the parties thereto. That Exhibit "C" attached to defendants' answer is a true copy of said amendment. That both said trust instrument and said amendment are by this reference incorporated herein.

5. That in or about the month of April 1954 Valley Group Negotiating Committee requested and demanded that plaintiffs sign a collective bargaining agreement entitled, "Agreement Amending Master Contract of the Valley Group Negotiating Committee, dated July 1953." That a copy of said

collective bargaining agreement is attached hereto and made a part hereof as Exhibit "C". That plaintiffs and each of them refused to sign said collective bargaining agreement, to wit, Exhibit "C", attached hereto, and in or about the month of May, 1955, Valley Group Negotiating Committee caused the employees of plaintiffs to strike, and said employees of plaintiffs did thereupon strike until plaintiffs and each of them signed and executed said collective bargaining agreement. That plaintiffs and each of them individually executed said collective bargaining agreement, to wit, Exhibit "C", attached hereto, in or about May 1955. That plaintiffs and each of them have made payments to said trust, to wit, Exhibits "B" and "C" attached to defendants' answer, in the amounts set forth in plaintiffs' complaint on file herein, but plaintiffs have refused to pay and do refuse to pay any further sums to said trust under said agreement.

6. That as a result of said strike said plaintiffs filed with the Twentieth Region of the National Labor Relations Board an Unfair Labor Practice Charge dated June 6, 1955, and numbered [39] herein 20-CB-404 against defendants Local Union No. 246 and Paul L. Reeves, charging amongst other things a violation of Section 8 (b) (3) L.M.R.A. 1947 (29 U.S.C. 158 (6) 3) i.e., that said defendants by striking to obtain the inclusion of said clause Section 15 (a) in said 1954 Amended Collective Bargaining Agreement had refused to bargain collectively with the plaintiffs.

7. That on July 18, 1955, said plaintiffs were

notified by the Regional Director of the Twentieth Region of the National Labor Relations Board that after carefully investigating the charge he was refusing to issue a complaint.

8. That said 1954 Amended Collective Bargaining Agreement was terminated in the manner and form provided by Section 8 (d) L.M.R.A. 1947 (29 U.S.C. 158) and a new 1955 Collective Bargaining Agreement was negotiated in the manner and form provided by said Section 8 (d) L.M.R.A. 1947, a copy of which as Exhibit "A" is attached to defendants' answer.

9. Defendant Pipe Trades District Council No. 36 has requested plaintiffs and each of them individually to sign and execute a collective bargaining agreement in the form of Exhibit "A" attached to defendants' answer. Plaintiffs and each of them individually have refused to execute said collective bargaining agreement and to pay into said trust any of the sums specified in said agreement in accordance with the terms of said agreement.

10. Defendant, Pipe Trades District Council No. 36 is prepared and is willing to negotiate with said plaintiff employers concerning the terms and conditions of a collective bargaining agreement; however, Pipe Trades District Council No. 36 is prepared to cause the employees of plaintiffs to strike to obtain the inclusion of said Section 16 of Exhibit "A" attached to defendants' answer in a collective bargaining agreement with said plaintiffs, and each of them. [40]

11. That all payments required to be made by employers for hours worked in the Counties of

Fresno, Tulare, Madera and Kings by reason of Section 15 (a) of the 1954 Amended Collective Bargaining Agreement and Section 16 of the Collective Bargaining Agreement not yet executed by plaintiffs, Exhibit "A" attached to defendants' answer, are required to be made to said Plumbing and Pipe Fitting Labor - Management Relations Foundation.

12. That no demand has been made on plaintiffs, or any of them, or any other employer at any time prior to the date of this stipulation, and none is now made by Pipe Trades District Council No. 36, Local Union No. 246, Paul L. Reeves, or the business manager or any officer, agent or employees of said District Council or Local Union other than as set forth in the Exhibits.

13. At all times plaintiffs were and are doing plumbing work in the Counties of Fresno, Madera, Kings and Tulare and employ amongst others members of Local No. 246 in the performance of such work.

14. Neither party to this stipulation stipulates that the facts set forth herein are relevant or material to any issue raised by the complaint or answer.

ROTH AND BAHRs,
/s/ By GEORGE O. BAHRs,
/s/ PAUL K. DOTY,
Attorneys for Plaintiffs.

/s/ P. H. McCARTHY, JR.,
Attorney for Defendants and Each
of Them. [41]

EXHIBIT "A"

Master Contract of Northern California Conference
of Plumbing and Heating Industry and the
Valley Group Negotiating Committee.

This agreement made and entered into this 20th
day of July, 1952 by and between the Employer
and the Union.

Witnesseth:

It is hereby mutually understood and agreed as
follows:

Section 1. Definitions.

(A) The term "Employer" as used in this agree-
ment means the Northern California Conference of
the Plumbing and Heating Industry, Inc. for and
on behalf of the

Associated Plumbing Contractors of Central Cali-
fornia, Inc.,

Associated Plumbing Contractors of Stanislaus
and Merced Counties, Inc.,

Associated Mechanical Contractors of Monterey
County,

Butte County Merchant Plumbers Association,
Heating, Piping and Air Conditioning Contrac-
tor Association of Northern California, Inc.,

Master Plumbers Association of Sacramento, Inc.,

Master Plumbers Association of Stockton,

Bakersfield Associated Plumbing Contractors,

Yuba-Sutter Master Plumbers Association

(hereinafter called Employer Associations) and
Individual Employers members of the Northern
California Conference of the Plumbing and Heat-

ing Industry, Inc., and such Individual Employers members of other associations, whose members are holders of the Licenses set out in Sub-section (C) of this Section, affiliated with the Northern California Conference of the Plumbing and Heating Industry, Inc., (hereinafter called Employer Association) who perform work covered by this agreement, when, as and if such work is performed within the territorial jurisdiction of the Local Unions covered by this agreement.

(B) The term "Union" as used in this agreement means the Valley Group Negotiating Committee acting as the agent of Local Unions No. 62, 228, 246, 365, 437, 447, 460, 492, 503, and 607 of the United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada.

(C) The term "Individual Employer" as used in this agreement means all holders of one or more contractors license C-4, C-16, C-20, C-27, C-36, C-38, C-42, C-57, C-61, issued by the Contractors' State License Board of the State of California who are members of the Employer or any of the Employer Associations set out in sub-section (A) hereof and any non-member holder of one or more such license who may with the written consent of the Union execute this agreement.

(D) The term "Local Union" as used in this agreement means any of the Local Unions enumerated in sub-section (B) hereof and any other Local Union which may hereafter authorize the Valley Group Negotiating Committee in a manner and form acceptable to said committee to act as its

agent and to bind it for the purposes of this agreement.

Section 2. Warranties.

(A) 1. The Employer warrants that it is authorized to bind all Individual Employers who are now members of Northern California Conference of the Plumbing and Heating Industry, Inc., or the members of the Employer Associations set out in Section I (A) hereof, and Employer makes this agreement on its own behalf and on behalf of each of its principals set out in Section I (A) hereof, and on behalf of each of the members of each of the Employer Associations set out in Section I (A) hereof, and the Employer agrees on its behalf and on behalf of each of the Employer Associations set out in Section I (A) hereof that no new or additional members will be admitted to membership in Employer or any Employer Association set out in Section I (A) hereof unless and until such new or additional member, a holder of one or more of the "C" Contractor licenses set out in Section I (A) is by reason of such membership bound by this agreement.

2. It is further agreed that this agreement shall be binding upon the successors of Employer and each of the Employer Associations set out in Section I (A) hereof, and upon the heirs, executors, administrators, successors, purchasers, and assigns of the Individual Employers covered by this agreement.

(B) The Union warrants that it is authorized

to bind the Local Unions set out in Section I (B) hereof.

Section 3. Coverage of Agreement.

(A) Territory Covered.

All of the State of California coming under the territorial jurisdiction of the Local Unions covered by this agreement.

(B) Employees Covered.

This agreement shall apply to and cover the Individual Employers and all workmen employed by the Individual Employers covered hereby who perform any type of work covered by this agreement,

(C) Work Covered.

This agreement shall cover all work coming within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, recognized by the Building and Construction Trades Department of the American Federation of Labor except transportation oil and gas pipeline work as defined in the State-Wide Pipeline Agreement dated July 31, 1950.

Section 4. Recognition of Bargaining Agents.

Union recognized as collective bargaining representative of employees.

The Employer, Employer Associations and the Individual Employers recognize the Union as the sole and exclusive collective bargaining representative of all employees of the Individual Employers performing work covered by this agreement. [44]

* * * * *

Section 10. Joint Conference Board.

(A) It is the intention of the parties to this agreement to settle problems that may arise on a local level; however, in order to bring about general recognition and enforcement of this agreement the parties hereto shall proceed to set up a Joint Conference Board, of sixteen (16) members; eight (8) members shall be selected by the Union and eight (8) by the Employer.

(B) Contemporaneously with the execution of this Agreement the Employer shall notify the Union and the Union shall notify the Employer in writing of their respective Board Members.

(C) The Joint Conference Board shall agree upon and determine the time and place of meeting, the rules of procedure, shall elect a chairman and a secretary from its membership, and shall determine upon all other details necessary to promote and carry on the business for which it is [46] appointed.

The function of the Joint Conference Board shall be:

1. To establish the general recognition and enforcement of the wages, hours, and working conditions of the Agreement.

2. To hear and adjust disputes or differences which may arise in the enforcement or interpretation of this agreement except those under Sections 5, 6, and 14 hereof.

3. To promote the mutual interest of the parties to this agreement.

4. Pending the decision upon any dispute or

grievance, work shall be continued in accordance with the provision of this agreement.

(D) If the Joint Conference Board, after meeting, cannot agree on any matter referred to it, the members thereof shall choose an impartial person who shall act as an additional member of the Joint Conference Board and participate in the making of a decision by a majority of the members. Said decision shall be rendered within ten (10) days after submission and shall be final and binding on all parties hereto. Any expense of employing such impartial person to sit shall be borne equally by the Employer and Union.

(E) The Joint Conference Board shall meet at the time and place set by the Employer if an individual Employer is the complaining party or at the time and place set by the Union if a Local Union or employee is the complaining party. The place of the meeting shall be in the jurisdiction of the Local Union in which the dispute arose. The time shall be not less than five (5) or more than ten (10) days from the date the dispute, complaint or grievance is called to the attention of the other party. Notice of time and place shall be given at the time the dispute, complaint or grievance is called to the attention of the other party. [47]

* * * * *

Section 21. Effective and Termination Date.

This Agreement shall be effective as of the 1st day of July 1952 and remain in effect until midnight the 30th day of June 1953, and shall be renewed from year to year thereafter, unless either

party shall given written notice to the other of a desire to change at least sixty (60) days prior to the date of the expiration of this Agreement.

It is agreed that in the event that either party should exercise its rights under the paragraph last set out above they will for a period of sixty (60) days prior to the 30th day of June, 1953 bargain exclusively with each other with respect to all wage rates, working conditions and hours of employment for the work herein covered. The parties shall meet within 15 days of the receipt of the first notice hereinabove provided. If no agreement has been entered into at the expiration of said sixty (60) days' period, then this agreement shall thereupon cease and terminate and the parties shall be free to negotiate with whomsoever they please. The parties may, by mutual agreement in writing signed by the Employer and Union, extend this Agreement.

In Witness Whereof, the parties hereto have hereunto set their hands and seals by their respective duly authorized officers the day and year first above written.

Union

Valley Group Negotiating Committee

By Paul L. Reeves

Chairman

By Paul L. Reeves

Business Manager

Local Union No. 246

10/1/52—PLR

Employer

Northern California Conference of the Plumbing
and Heating Industry, Inc.

By K. Fahy

Vice President

By Nat N. Leas,

Partner

Individual Employer's

Conditioned Air

Firm Name

249 No. H St., Fresno

Address

Employer given copy 10/1/52—PLR. [56]

EXHIBIT "B"

Master Contract of the Valley Group Negotiating
Committee

This Agreement made and entered into this
day of July, 1953, by and between the Individual
Employer signatory hereto and the Union.

Witnesseth:

It is hereby mutually understood and agreed as
follows:

Section 1: Definitions.

(A) The term "Union" as used in this agree-
ment means the Valley Group Negotiating Commit-
tee acting as the agent of Local Unions No. 62, 228,
246, 365, 437, 447, 460, 492, 503, 607 and 662 of
the United Association of Journeymen and Appren-

tices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

(B) The term "Individual Employer" as used in this Agreement means all holders of one or more contractor's license C-4, C-16, C-20, C-27, C-36, C-38, C-42, C-57 and C-61 issued by the Contractors' State License Board of the State of California.

(C) The term "Local Union" as used in this Agreement means any of the Local Unions enumerated in sub-section (A) hereof and any other Local Union which may hereafter authorize the Valley Group Negotiating Committee in a manner and form acceptable to said committee to act as its agent and to bind it for the purpose of this Agreement.

Section 2: Warranties.

1. It is agreed that this agreement shall be binding upon the Union and Local Unions set out in Section 1 (A) hereof, and upon the heirs, executors, administrators, successors, purchasers, and assigns of the Individual Employers covered by this agreement.

2. The Union warrants that it is authorized to bind the Local Union set out in Section 1 (A) hereof.

Section 3: Coverage of Agreement.

(A) Territory Covered

The area covered by this Agreement shall be the following counties in the State of California:

Siskiyou, Modoc, Trinity, Shasta, Lassen, Tehama, Glenn, Butte, San Joaquin, Calaveras, Alpine, Stanislaus, Toulumne, Merced, Mariposa,

Santa Cruz, [57] Plumas, Sierra, Colusa, Sutter, Yuba, Yolo, Sacramento, Nevada, Placer, Amador, Monterey, Madera, Fresno, Kings, Tulare, Mono, Inyo, Kern, El Dorado.

For the purpose of this Agreement, the geographical area above defined shall be known as the Valley Group area.

It is mutually understood and agreed that in the event a Local Union of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada should become a part of the Valley Group Negotiation Committee it may add the territorial jurisdiction of such local union or unions to the territory covered by this Agreement under such terms and conditions as it deems best.

(B) Employees Covered.

This Agreement shall apply to and cover all persons who perform any type of work covered by this Agreement for an Individual Employer signatory hereto.

(C) Work Covered.

This Agreement shall cover all work coming within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, recognized by the Building and Construction Trades Department of the American Federation of Labor except transportation oil and gas pipeline work, as defined in the statewide Pipeline Agreement dated July 31, 1950.

The Individual Employer agrees that all work

covered by this Agreement whether performed by the Individual Employer or by any person, firm or corporation for or on behalf of the Individual Employer by sub-contract or otherwise shall be performed under the terms and conditions of this Agreement.

Section 4: Recognition of Bargaining Agents.

(A) The Individual Employers recognize the Union as the sole and exclusive collective bargaining representative of all employees of the Individual Employers performing work covered by this Agreement.

[Note as Per Stipulation Designating Contents of Record: "Exhibit B unlike Exhibit A contains no provision for a Joint Conference Board or arbitration."] [58]

* * * * *

Section 19: Effective and Termination Date.

This Agreement shall be effective as of the 3rd day of August, 1953 and remain in effect until midnight of the 30th day of June, 1954, and shall be renewed from year to year thereafter, unless either party shall give written notice to the other of a desire to change at least sixty (60) days prior to the date of the expiration of this Agreement.

Since it is anticipated that this Agreement will be executed by more than one Individual Employer, notice to any Individual Employer shall be deemed notice to all Individual Employers signatory [67] hereto.

In Witness Whereof, the parties hereto have

hereunto set their hands and seals by their respective duly authorized officers the day and year first above written.

Union

Valley Group Negotiating Committee

By Paul L. Reeves

Chairman

By

Business Manager

Local Union No.

Individual Employer

.....

.....

..... [68]

EXHIBIT "C"

Agreement Amending Master Contract of the Valley Group Negotiating Committee, Dated July, 1953.

This Agreement, made and entered into the day of April, 1954, by and between the Valley Group Negotiating Committee and the following Master Plumbers Associations as the attorney in fact for the members of each of them and all contractors covered by the Master Agreement for and on whose behalf each of them is authorized to engage in collective bargaining with respect to Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry and any Individual Employer who desires to sign this Agreement.

Whereas, the parties hereto are desirous of avoid-

ing the necessity of re-opening their present agreement for the purpose of negotiating a new agreement, and

Whereas, in the opinion of the parties it is for the best interest of the Plumbing and Pipe Fitting Industry to continue the same agreements:

Now, Therefore, it is hereby mutually understood and agreed by and between the respective parties hereto that the present Master Agreement be and the same is hereby amended as follows: [69]

* * * * *

Add Section 15 (a) to Master Contract:

(A) Where a labor-management set up exists by agreement between the Local Master Plumbers Association, regardless of its name or organization, and a Local Union affiliated with the Committee requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments.

(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and Local Master Plumbers Association and shall be a part of this agreement.

Add Section 15(a) to Master Contract:

The Individual Employers covered by this agreement consent and agree to be bound by the terms of the effective Health and Welfare Trust Agree-

ment, Pension Trust Agreement and agreement creating any Labor Management set up. [71]

* * * * *

In Witness Whereof, the parties hereto have set their hands and seals this day of April, 1954.

Union

Valley Group Negotiating Committee

By Paul L. Reeves

Chairman

By

Business Manager

Local Union No.....

Individual Employers by

.....

By

.....

By

.....

By [72]

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

MOTION OF DEFENDANTS FOR SUMMARY
JUDGMENT

To Plaintiffs and their attorneys:

Come Now Defendants and each of them and move, and each of them moves the above-entitled

court for summary judgment against plaintiffs and each of them as prayed for in the answer.

This motion is based upon the pleadings and stipulation on file in the above-entitled matter.

/s/ P. H. McCARTHY, JR.,
Attorney for Defendants. [73]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT

Plaintiffs hereby move the court for summary judgment against defendants and each of them as prayed for in the complaint on file herein.

This motion is based upon the pleadings and upon the stipulation on file in the above-entitled matter.

ROTH AND BAHRs,
/s/ By GEORGE O. BAHRs,
/s/ PAUL K. DOTY,
Attorneys for Plaintiffs. [74]

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed February 20, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Plaintiffs seek an injunction against defendants to restrain and enjoin them from receiving or accepting any money or thing of value from plaintiffs contrary to the provisions of Section 302, Subsections (A) and (B) of the Labor Management Relations Act, 1947, as Amended. (29 USC Section 186.)

Plaintiffs Conditioned Air and Refrigeration Co., [75] Bell and Hughes, Inc., and Baird Sheet Metal Works are California corporations.

Plaintiffs Earl Griffith and John Dyer are co-partners, doing business as Griffith-Dyer.

All plaintiffs are engaged in businesses which come under the category of plumbing and pipe fitting. Their employees are members of the defendant Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The plaintiffs are all members of the Associated Plumbing Contractors of Central California, Inc., which is a member of the Northern California Conference of the Plumbing and Heating Industry.

The defendants are Plumbing and Pipe Fitting Labor-Management Relations Trust; Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada; Valley

Group Negotiating Committee and Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and Paul L. Reeves who is chairman of District Council No. 36 and a trustee of the Labor-Management Relations Foundation hereinbefore mentioned.

That under date of July 20, 1952, the Valley Group Negotiating Committee, predecessor to Pipe Trades District Council No. 36, acting as the agent of Local Union (among others) 246 of the United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada, entered into a collective bargaining agreement with the Northern California Conference of the Plumbing and Heating Industry, Inc., acting on behalf (among others) of the Associated Plumbing Contractors of Central California, Inc. A copy of [76] this agreement is attached as Exhibit "A" to the stipulation of facts filed herein on February 20, 1956. Under this contract the employers, including the plaintiffs, recognized the Union (the Negotiating Committee) as the sole and exclusive collective bargaining representative of all employees performing work covered by the agreement.

That in the summer of 1953 a collective bargaining agreement was entered into between the plaintiffs and the Valley Group Negotiating Committee acting as the agent (among others) of Local Union No. 246. A copy of this agreement is attached to the stipulation of facts marked Exhibit "B". In this

agreement the plaintiffs recognized the Union (Negotiating Committee) as the sole and exclusive collective bargaining representative of its employees performing work under the agreement.

That about the month of April, 1954, the Negotiating Committee demanded that plaintiffs sign agreement amending Exhibit "B" attached to the stipulation. Plaintiffs refused to do so and in about the month of May, 1955, the Negotiating Committee caused the employees of plaintiffs to strike, whereupon plaintiffs signed and executed such amendment, a true copy of which is attached to the stipulation of facts and marked Exhibit "C". The amendment to the contract did not change the recognition provisions of the prior contracts. Exhibit "C" among other things provided as follows:

"Add Section 13 (a) Pension Plan to Master Contract:

(A) A pension trust to be known as The Valley Group Pipe Trades Pension Fund shall be created in accordance with the provisions of the Labor Management Relations Act, 1947, as Amended. [77]

(B) The Pension Trust shall be created prior to July 1, 1954.

(C) Each Individual Employer shall, commencing July 1, 1954 pay into the Valley Group Pipe Trades Pension Fund ten (\$0.10) cents per hour for each hour worked, by each employee employed on work covered by this agreement."

* * * * *

"Add Section 15 (a) to Master Contract:

(A) Where a labor-management set up exists

by agreement between the Local Master Plumbers Association, regardless of its name or organization, and a Local Union affiliated with the Committee requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments.

(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and Local Master Plumbers Association and shall be a part of this agreement.

Add Section 15(a) to Master Contract:

The Individual Employers covered by this agreement consent and agree to be bound by the terms of the effective Health and Welfare Trust Agreement, Pension Trust Agreement and agreement creating any Labor Management set up."

That on or about the 9th day of February, 1954, Associated Plumbing Contractors of Central California, Inc. [78] and certain individual employers who were licensed contractors under the laws of the State of California and the defendant Local Union No. 246 entered into a trust indenture writing entitled "Plumbing and Pipe Fitting Labor-Management Relations Trust". A copy of this trust is attached to defendants' answer and marked Exhibit "B"; on the second day of August, 1955 said trust was amended and its name was changed to "Plumbing and Pipe Fitting Labor-

Management Relations Foundation". A copy of said amendment is attached to defendants' answer marked Exhibit "C". This amendment increased the Board of Trustees to 12, 6 to be appointed by the Union and 6 to be appointed by the Associated Plumbing Contractors of Central California, Inc. The amendment also added a paragraph (Article VI-A) on the subject of arbitration.

That a collective bargaining agreement dated June 17, 1955, was entered into between the District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (successor to the Valley Group Negotiating Committee) acting as the agent (among others) of Local Union No. 246 and Valley Mechanical Contractors Council, Inc., acting as the agent (among others) of Associated Plumbing Contractors of Central California and other individual employers. A copy of this agreement is attached to defendants' answer marked Exhibit "A". Section 16 of said agreement provides:

"Section 16: Labor-Management Relations.

(A) Where a labor-management set up exists by agreement between the Local Employer, regardless of its name or organization, and a Local Union affiliated with the Union requiring that payment or [79] payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local, make the required payment or payments.

(B) The nature, amount and time of such pay-

ment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and the Local Employer and shall be a part of this agreement.

(C) The Individual Employers agree to be and are bound by all of the terms and conditions of the effective labor-management set ups and the agreement, trust agreement or charter and by-laws creating and governing any such set up.

(D) An Individual Employer who works with the tools of the trade shall be irrevocably presumed for all purposes to have worked no more nor less than 160 hours in any month in which an Individual Employer works with the tools of the trade."

Demand was made by District Council No. 36 upon the plaintiffs to execute a collective bargaining agreement in the form of said Exhibit "A". Plaintiffs have, and each of them has, refused to execute such agreement or to pay into the trust any of the sums specified in accordance with the terms of said agreement except the amounts specified in the fifth cause of action set forth in the complaint. District Council No. 36 is prepared to cause the employees of plaintiffs to strike to obtain the inclusion of Section 16 in said Exhibit "A" in a collective bargaining agreement with the plaintiffs.

The answers of defendants admit that Local [80] Union No. 246 is a representative of employees, but deny that as to the employees here involved it is a "representative" of employees who are in an

industry affecting commerce within the meaning of Section 302 of the Labor Management Relations Act, 1947, as Amended, or at all. Defendants further admit that District Council No. 36 is as to the employees here involved a "representative" of employees within the meaning of said section and that its predecessor, Valley Group Negotiating Committee, was such a "representative" but deny that it or said Committee is or was as to the employees here involved "a representative of employees who are employed in an industry affecting commerce within the meaning of said Section."

Under the stipulation of facts filed herein it was stipulated:

"1. That during the calendar year 1955 plaintiff employers made direct purchases of goods and materials from outside the State of California in the amounts set opposite their names. Plaintiffs made purchases in California of goods and materials originating outside the State of California in the amounts set opposite their names; and plaintiffs furnished services and materials to firms engaged in commerce in the amounts set opposite their names, to wit:

	Direct	Indirect	
Baird Sheet	Purchases	Purchases	Services
Metal Works	\$240,683.24	\$29,389.00	\$10,919.29
Bell and Hughes	127,472.19	68,109.92	46,372.66
Conditioned Air	213,351.25	199,589.16	45,681.06
Griffith-Dyer	161,464.15	47,032.06	49,018.24"

The cause came on for trial on the 8th day of August, 1956. The plaintiffs were represented by

Roth and [81] Bahrs, George O. Bahrs, appearing, and Paul K. Doty. The defendants were represented by P. H. McCarthy, Jr. Each party moved for a summary judgment based upon the pleadings and the stipulation of facts on file. It was stipulated that the motions and the trial on the merits would be submitted based upon the pleadings and the stipulation of facts. The cause was then argued by counsel for the respective parties. All matters were taken under submission by the court.

At the outset, the defendants contend that this court lacks jurisdiction of the cause for two reasons: first, that the dollar volume of interstate business transacted by each plaintiff is too small to adversely affect interstate commerce and that in this type of suit the volume of business of the individual plaintiffs may not be aggregated; second, that the complaint fails to allege that the amount in controversy exceeds the sum or value of \$3,000 as required by Section 1331, U.S.C. Title 28.

It is my conclusion that the volume of business transacted by each plaintiff as set forth in the stipulation is sufficient to establish that the employees of each plaintiff are employed in an industry affecting commerce within the meaning of Section 302 of the Labor Management Relations Act, 1947, as Amended. *NLRB vs. Fainblatt*, 306 U.S. 601. With respect to failure of the complaint to allege that the sum or value in controversy exceeds \$3,000, I am satisfied that under the provisions of Section 302 (e) of the Labor Management Relations Act, 1947, as Amended, such an allegation is not re-

quired. Said section reads as follows:

“The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause [82] shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-110 and 113-115 of this title.”

The fact that the jurisdictional amount of \$3,000 was expressly excluded from the provisions of Sections 301 and 303 of the Labor Management Relations Act, 1947, as Amended, is not persuasive that the failure to make such exclusion in Section 302 operates to include such jurisdictional requirement. Sections 301 and 302 relate to suits for damages by private persons. Section 302 (a) and (b) make it unlawful to do the things proscribed by the provisions thereof. It is public rights which are being protected, and in my opinion the provisions of Section 302(e) grant jurisdiction to this court without regard to the sum or value in controversy if the volume of commerce of each plaintiff is not *de minimis*.

We will now pass to the basic issues which remain. Section 302(a) of the Labor Management Relations Act, 1947, as Amended, provides as follows:

“It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or

other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

Section 302(b) of the same Act provides as follows:

"It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of [83] such employees any money or other thing of value."

Section 302(c) of the same Act states that:

"The provisions of this section shall not be applicable (1) * * *; (2) * * *; (3) * * *; (4) * * *; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be

made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered [84] to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employers are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities."

Section 302(d) provides as follows:

"Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject

to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both."

There is no dispute between the parties over the facts that the collective bargaining agreement (Exhibits "B" and "C" attached to the stipulation of facts) did and that the collective bargaining agreement (Exhibit "A" attached to the defendants' answer) does provide that each individual employer covered by the collective bargaining [85] agreement, on work covered by said collective bargaining agreement, shall pay into the Plumbing and Pipe Fitting Labor-Management Relations Foundation (a trust) (Exhibits "B" and "C" attached to defendants' answer) ten (\$0.10) cents per hour for each hour worked by each employee of each individual employer covered by the said collective bargaining agreements. It is also clear that the Valley Group Negotiating Committee was a labor organization and was recognized by the employers as the sole and exclusive bargaining representative of all employees of the individual employers performing work covered by the agreement and that District Council No. 36 (the successor of the Committee) a labor organization, was recognized as the sole and exclusive collective bargaining representative of the individual employer performing work covered by the collective bargaining agreement.

The Plumbing and Pipe Fitting Labor-Management Relations Foundation was created by, and its trustors are, Associated Plumbing Contractors, Inc. (a non-profit membership corporation composed of individual employers, members and

non-members of said Association) and Plumbers and Steam Fitters Local Union No. 246 (a labor organization, a local Union).

The collective bargaining agreement (Exhibits "B" and "C" attached to the stipulation) provide "where a labor-management set up exists by agreement between the local Master Plumbers Association, regardless of its name or organization, and a local Union affiliated with the Committee requiring that payment or payments be made, all individual employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments," [86] and that "the individual employers covered by this agreement consent and agree to be bound by the terms of the effective Health and Welfare Trust Agreement, pension trust agreement and agreement creating any labor-management set up." The collective bargaining agreement (Exhibit "A" attached to defendants' answer) contains similar provisions.

The Plumbing and Pipe Fitting Labor-Management Relations Foundation does not conform to the requirements of Section 302(c)(5) and the defendants do not contend that it does. The defendants maintain that the trust is not a "representative" within the meaning of the provisions of Section 302; that the trust is a separate entity and that Section 302 does not outlaw or forbid payments to and acceptance by those persons and entities who or which are not "representatives". Defendants further point out that six of the trustees of the

trust are selected by the employers and that six are selected by Local Union No. 246, which fact prevents the Local Union from dominating and controlling the actions of the trustees.

As noted above, Section 302 makes it unlawful for any employer to pay or deliver or to agree to pay or deliver any money or other thing of value to any representative of any of his employees or for any representative of any employees to receive or accept or agree to receive or accept from the employer any money or other thing of value.

The Labor Management Relations Act of 1947, as Amended, states: "The terms 'commerce', 'labor disputes', 'employer', 'employee', 'labor organization', 'representative', 'person', and 'supervisor' shall have the same meaning as when used in subchapter II of this chapter as amended by this chapter." Section 142, subsection 3, U.S.C.A. Title 29.

Section 152, subsection 4, Title 29 U.S.C.A., states: "The term 'representative' includes any individual [87] or labor organization." Subsection 5 of Section 152 states: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The Supreme Court of the United States had occasion to interpret the meaning of the word "representative" as used in Section 302. *U.S. v. Ryan*,

350 U.S. 299. The Court held that the term "representative" in section 302 is not limited to the exclusive bargaining representative of the employees, but includes any person authorized by the employees to act for them in dealings with their employers. The Court also stated that a narrow reading of the term "representative" would substantially defeat the purposes of the Act.

It is conceded that the Valley Group Negotiating Committee was, and that District Council No. 36 is a representative of employees of the plaintiffs within the meaning of Section 302. It is further conceded that Local Union No. 246, one of the founders of the Trust, is a "labor organization". The question remains, however, whether Local Union 246 is a "representative" within the meaning of Section 302. It is true that the Collective Bargaining Agreements state that the employers recognize the Valley Group Negotiating Committee under one contract, and the District Council No. 36 in the other contract, as the exclusive bargaining representative of the employees of the employers. The Court, however, is not bound by such declaration, but must determine from the documents in this case the true and legal status of Local No. 246. [88] In executing the collective bargaining agreements, the Valley Group Negotiating Committee and District Council No. 36 expressly acted as agent of Local 246 and other local unions.

Pertinent parts of the collective bargaining agreement dated July 1, 1955 (Exhibit "A" at-

tached to the answer of the defendants) read as follows:

“Section 1: Definitions.

(A) The term ‘Union’ as used in this agreement means the District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada successor to the Valley Group Negotiating Committee acting as the agent of Local Unions No. 246, 365, 437, 492, 503, 607, and 662 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.

* * * * *

(D) The term ‘Local Union’ as used in this Agreement means any of the Local Unions enumerated in subsection (A) hereof and any other Local Union which may hereafter authorize the Union in a manner and form acceptable to said Union to act as its agent and to bind it for the purpose of this agreement.

Section 2: Warranties.

1. It is agreed that this agreement shall be binding upon the Union and Local Unions set out in Section 1 (A) hereof, and upon the Employer, Local Master Plumbers Associations set out and individual employers who are members of any Local Master [89] Plumbers Association set out in Section 1(B) hereof, and upon the heirs, executors, administrators, successors, purchasers, and assigns of the Individual Employers covered by this agreement.

2. The Union warrants that it is authorized to

bind the Local Union set out in Section 1(A) hereof.

* * * * *

Section 5: Union Membership.

(A) All Employees covered by this agreement shall be required as a condition of employment to apply for and become members of and to maintain membership in the Local Union, with jurisdiction within thirty-one days following the beginning of their employment under this agreement or the effective date of this sub-section (A) whichever is the later. This section shall be enforceable to the extent permitted by law.

* * * * *

Section 6.

Subsection (B) Individual Employers must secure all Journeymen and Apprentices through the employment office of the Local Union with jurisdiction at the site of the work, and the Union agrees that the Local Union will furnish competent Journeymen and Apprentices within forty-eight (48) hours when available.

1. The Individual Employer may call for a specific employee by name to be dispatched and the Local Union shall dispatch such employee provided that such employee is available, and [90]

(a) is a preferred employee as defined in Section 6 (A) 1, and

(b) has not been employed outside of the Territorial jurisdiction of the Local Union within which the job site is located within 90 days of the employer calling for him by name except that this

subsection (b) shall not apply to an employee who has worked outside the territorial jurisdiction of the Local Union under paragraph (C) 2 of Section 6 within such 90 day period.

2. In the event that employees with a preference as herein defined are not available to fill vacancies, then the Local Union will undertake to supply the employers with competent and satisfactory employees. Neither as to such undertaking, nor as to any other portion of this agreement, shall any employee be discriminated against by reason of either membership in or non-membership in any Union.

3. The Local Unions will maintain appropriate registration facilities without discrimination either in favor of or against such applicants by reason of membership in our non-membership in any Union.

* * * * *

(C) The provisions with respect to preference in employment by reason of prior employment are subject to the following limitation:

1. That whenever any test is required of any workman by any Individual Employer, the [91] Local Unions upon being requested to furnish men for such test will dispatch only workmen who are experienced in the type of work for which the test is required, unless otherwise expressly agreed to by the Individual Employer.

Before any workman commences the test, he shall be placed on the payroll of the Individual Employer. Any workmen failing to pass the test shall be paid straight time for the test period but in no event less than four (4) hours at straight time.

2. On work contracted for by an Individual Employer outside the jurisdiction of the Local Union in which the Individual Employer's shop is located such Individual Employer may send one man to said job from the territorial jurisdiction of such Local Union; provided, however, that the Individual Employer shall notify the Local Union with territorial jurisdiction over the area in which the job site is located of the name of the Employee and the location of the job prior to the time the Employee is sent into the area and that the Employee before reporting to the job site, shall report to the Local Union having territorial jurisdiction over the area in which the job site is located in person, by telephone, by telegram, or in writing and the Local Union shall dispatch him. Adjacent Local Unions may enter into more liberal local understandings to cover jobs of short duration. [92]

Section 7: Competency and Qualifications.

The Individual Employer shall be the sole judge of the competency of his employees and may discharge any employee for cause. The Local Unions shall be the sole judge of the qualifications of their members for membership in the Local Union.

Section 8: Cessation of Work.

It is mutually agreed and understood that during the period when this agreement is in force and effect the Individual Employer will not lockout his employees and the Union will not authorize any strikes, slow-down or stop work, in any dispute, complaint or grievance arising under the terms and conditions of this agreement, except such disputes,

complaints or grievances as arise out of the failure or refusal of the Individual Employer to comply with the provisions of the Sections 5, 6, 13, 14, 15 and 16 hereof. As to any such Individual Employer who shall fail or refuse to comply with the provisions of these Sections or any of them, so long as such failure or refusal continues, it shall not be a violation of this agreement if the Union or Local Union withdraws its members who are subject hereto from the performance of work for such Individual Employer and such withdrawal for such period shall not be a strike or work stoppage within the terms of this agreement. Any employees so withdrawn or refusing to perform any work as herein provided shall not lose their status as employees but no such employee shall be entitled to claim or receive any wages or other compensation for any period during which he has been so [93] withdrawn or refused to perform work.

* * * * *

Section 10: Jurisdictional Disputes.

In the event of any dispute between Local Unions of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada as to the jurisdiction of the work performed by Individual Employers, such dispute shall be referred to, and settled by the United Association. In the event of any dispute as to jurisdiction of the work covered by the terms of this agreement by reason of any such work being claimed by a union or unions other than the United Association, such dispute shall be

referred and settled in accordance with any procedure or agreement for the settlement of jurisdictional disputes to which the United Association is a party or by which it is bound.

It is agreed that this agreement shall constitute an original assignment of work to the employees covered hereby on work performed by the Individual Employers covered hereby. In either event, the parties hereto agree that there will be no slow-down or stoppage of the work and each agrees that the decisions of the authorities stipulated herein shall be final and binding upon them.

* * * * *

Section 16: Labor-Management Relations.

(A) Where a labor-management set up exists by agreement between the Local Employer, regardless [94] of its name or organization, and a Local Union affiliated with the Union requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments.

(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and the Local Employer and shall be a part of this agreement.

(C) The Individual Employers agree to be and are bound by all of the terms and conditions of the effective labor-management set ups and the agree-

ment, trust agreement or charter and by-laws creating and governing any such set up.

(D) An Individual Employer who works with the tools of the trade shall be irrevocably presumed for all purposes to have worked no more nor less than 160 hours in any month in which an Individual Employer works with the tools of the trade.

Section 17: Joint Conference Board.

(A) In those areas in which labor-management set ups exist, such labor-management set up shall function as a Joint Conference Board with all the powers, rights, duties and obligations hereinafter lodged in the Joint Conference Board.

(B) It is the intention of the parties to this agreement to settle problems that may arise on a local level; however, in order to bring about [95] general recognition and enforcement of this agreement, the parties hereto shall proceed to set up a Joint Conference Board, of four (4) members. Two (2) members shall be selected by the Local Union and two (2) by the Local Employer.

(C) Contemporaneously with the execution of this agreement the Local Employer shall notify the Local Union and the Local Union shall notify the Local Employer in writing of their respective Board Members.

(D) The Joint Conference Board shall agree upon and determine the time and place of meeting, the rules of procedure, shall elect a chairman and a secretary from its membership, and shall determine upon all other details necessary to promote

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and carry on the business for which it is appointed.

The function of the Joint Conference Board shall be:

1. To establish the general recognition and enforcement of the wages, hours, and working conditions of the agreement.

2. To hear and adjust disputes or differences which may arise in the enforcement or interpretation of this agreement except those under Sections 5, 6, 13, 14, 15 and 16.

3. To promote the mutual interest of the parties to this agreement.

4. Pending the decision upon any dispute or grievance, work shall be continued in accordance with the provision of this agreement. [96]

(E) If the Joint Conference Board, after meeting, cannot agree on any matter referred to it, the members thereof shall choose an impartial person who shall act as an additional member of the Joint Conference Board and participate in the making of a decision by the majority of the members. Said decision shall be rendered within ten days after submission and shall be final and binding on all parties hereto. Any expense of employing such impartial person to sit shall be borne equally by the Local Employer and Local Union.

(F) The Joint Conference Board shall meet at the time and place set by the Local Employer if an Individual Employer is the complaining party or at the time and place set by the Local Union if a Local Union or employee is the complaining party. The place of the meeting shall be in the jurisdic-

tion of the Local Union in which the dispute arose. The time shall be not less than five (5) days or more then ten (10) days from the date the dispute, complaint or grievance is called to the attention of the other party. Notice of time and place shall be given at the time the dispute, complaint or grievance is called to the attention of the other party."

Similar provisions are contained in the collective bargaining agreements negotiated by the Valley Group Negotiating Committee (Exhibits "A", "B" and "C", attached to stipulation of facts). [97]

I am satisfied from an analysis of the quoted provision of the collective bargaining agreements that Local Union No. 246 is in fact and in law a party to such agreements, and therefore a "representative" of the employees of the plaintiffs within the meaning of Section 302.

Is the Plumbing and Pipe-fitting Labor-Management Relations Foundation a "representative" of the employees of plaintiffs? The Trust recites that "Whereas there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor or improper work and workmanship, and

Whereas, the absence of such effective machinery is producing chaos in the Plumbing and Pipe-fitting industry and is endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confi-

dence of the public in the employers and in the plumbing and pipe-fitting industry,

Now, therefore, to correct this situation, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees, to restore the trust and confidence of the public in the employers and the plumbing and pipe-fitting industry, this Trust is created."

The stated purposes of the Trust are to perform and perfect "an organization for the purpose of improving the relationship between the employers and employees making up the plumbing and pipe-fitting industry and the general public, and to enforce the collective bargaining agreement and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the [98] Plumbing and Pipe-fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the plumbing and pipe-fitting industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship."

The only specific purposes of the Trust are to enforce the collective bargaining agreement and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, and to protect the wages, rates of pay, hours of labor and

other conditions of employment of the employees in the plumbing and pipe-fitting industry. The other stated purposes are vague and uncertain.

The Trust agreement states that the Board of Trustees is authorized to, and shall have the power to pay out of the assets of the Trust, at the sole and exclusive discretion of the trustees, for, among other things, "to protect the wages, rates of pay, hours of employment, and other conditions of employment of the employees in the plumbing and pipe-fitting industry, * * to enforce the collective bargaining agreements and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada." The Board of Trustees is authorized "to employ such executive, administrative, accounting, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the carrying out of the Trust and to pay or cause to be paid, out of the Trust the compensation and [99] expenses of such personnel and assistants, the cost of office space, furnishings and supplies and other expenses of the Trust."

It must be presumed that the Trust will carry out the specifically stated provisions for which it was formed, and which are above quoted. The Trust comes within the term "labor organization" as defined in Subsection 5 of Section 152, Title 29 U.S.C.A., and is a "representative" of the employees under Section 4 of Section 152. It is my view

that the Trust is a "representative" of the employees of the plaintiffs. It is clear under the decision of *United States vs. Ryan*, (*supra*) that a "representative" is not limited to the exclusive bargaining agent of the employees. The fact that the Trust agreement contains an arbitration clause cannot operate to validate acts prohibited by Section 302.

It is clear to me that if the plaintiffs were required to make the payments in question to Local Union 246, such payments and receipt would be forbidden by Section 302. The fact that the payments are to be made to the Trust does not, in my opinion, alter the situation, since the Trust under the documents under review, is likewise a "representative" of the employees of the plaintiffs. Furthermore, it is my view that the prohibition in Section 302 forbidding the payment of money or other thing of value to a representative, or the receipt thereof by a representative, is not limited to cash or tangible property. The expression, "other thing of value" would include the benefits flowing from the use or application of the money paid. Under the Trust in question, the payments required to be made by the plaintiffs are to be devoted to enforcement of the collective bargaining agreements, to protect wages, hours of labor, conditions of employment, and to hire personnel, furnish office space, et cetera, to carry [100] out such purposes. It is my view that this constitutes payment of a thing of value to Local 246. The fact that the control of the Trust is equally divided between the employers and the representatives of the employees

does not change the situation in view of the provisions of the Trust Agreement.

The defendants have cited the cases of *United Marine Division v. Essex Transportation Company*, 216 Fed.2d 410; *Rice-Stix Dry Goods Company v. St. Louis Labor Health Institute*, D.C.E. Mo. 22 LRRM 2528; *People v. Cilento*, 143 N.Y.S. 2d 705; and *Bay Area Painters and Decorators Joint Committee, Inc. v. Orack*, 102 C A 2d 81. In the *Essex* case, payments by the employer were to be made to six trustees of a welfare fund. From aught that appears in the opinion of the Court the Trust providing for the welfare fund was in strict compliance with the requirement of Section 302(c)(5). Admittedly, the Trust here involved does not so comply. In the *Rice-Stix* case, the Court concluded that the Health Institute was a corporation independent of the labor union which was a representative of the bargaining unit of the employees of the plaintiff. The fund created was to be used for health purposes. In neither of the cases was there a trust agreement containing provisions such as the quoted provisions of the Trust here in question. The *Cilento* case involved a construction of the Penal Statute of the State of New York, and in my opinion, the correct decision was reached under the facts and the applicable law.

In the *Orack* case, the Court determined that the agreement in question did not constitute a monopoly or a restraint of trade under the law of the State of California. It did not involve Section 302 of Title 29 U.S.C.A. [101]

My attention has been called to a memorandum order made by the Honorable Edward P. Murphy, United States District Judge, Northern District of California, in the case of Sheet Metal Contractors Association of San Francisco vs. Sheet Metal Workers International Association, No. 35206. In his memorandum order Judge Murphy stated that the purposes for which the Board [Joint Industry Board] was established are not entirely clear. I have had the opportunity of examining the Trust Agreement establishing the Joint Industry Board. I find nothing in the agreement to indicate that it was any purpose of the Joint Industry Board to enforce the collective bargaining agreement between the Union and the employees of the plaintiff or to protect the wages, rates of pay, hours of labor or other conditions of employment of such employees, or to expend its fund for such purposes.

I am aware that labor-management plans are to be encouraged. I recognize that great strides have been made in such fields to the benefit of labor, management and the public. As a Judge, however, as stated by counsel for the defendant, my duty is to determine whether the cloth is cut to fit the pattern laid down by the Legislature. It is not for the Court to push or pull the pattern to fit the cloth already cut or to trim the cloth already cut to fit the pattern.

Accordingly, the motions for summary judgment are denied and judgment is ordered for the plaintiffs.

Counsel for the plaintiffs are directed to prepare and file findings of fact, conclusions of law, and form of judgment, in accordance with the rules of this Court. [102]

The Clerk of this Court is directed to forthwith mail copies of this order to respective counsel.

Dated: October 23, 1956.

/s/ GILBERT H. JERTBERG,
Judge of the U. S. District Court.

[Endorsed]: Filed Oct. 24, 1956.

In The United States District Court, Southern
District of California, Northern Division

No. 1517 ND

CONDITIONED AIR AND REFRIGERATION
CO., a California corporation; BELL AND
HUGHES, INC., a California corporation;
BAIRD SHEET METAL WORKS, a Cali-
fornia corporation; EARL GRIFFITH AND
JOHN DYER, a co-partnership doing business
under the name of GRIFFITH-DYER,

Plaintiffs,

vs.

PLUMBING AND PIPE FITTING LABOR-
MANAGEMENT RELATIONS TRUST; LO-
CAL UNION NO. 246 OF THE UNITED
ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF THE
UNITED STATES AND CANADA; PIPE
TRADES DISTRICT COUNCIL NO. 36 OF
THE UNITED ASSOCIATION OF JOUR-
NEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUS-
TRY OF THE UNITED STATES AND
CANADA; VALLEY GROUP NEGOTIAT-
ING COMMITTEE; and PAUL L. REEVES,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

This cause came on to be heard on the 8th day

of August, 1956, before the court sitting without a jury.

By stipulation of counsel in open court the parties submitted this matter to the court for final decision and judgment on the record made before the court on the cross-motions of the [104] parties for summary judgment, both parties electing to waive the introduction of further evidence.

The evidence submitted consists of the written Stipulation of Facts with the exhibits which are made a part thereof, together with allegations of fact not denied or expressly admitted by the pleadings.

After a full and careful consideration of the evidence and the briefs and oral arguments of the parties the court makes and enters the following findings of fact and conclusions of law:

Findings of Fact

1. All plaintiffs are engaged in the plumbing and pipe fitting business in Fresno, California.

In the performance of such business plaintiffs employ journeymen and apprentice plumbers and pipe fitters who at all times were and are members of defendant Union Local No. 246.

2. During the calendar year 1955 plaintiff employers made direct purchases of goods and materials from outside of the State of California in the amounts set opposite their names. During said year plaintiffs made purchases in California of good and materials originating outside the State of California in the amounts set opposite their names;

and plaintiffs furnished services and materials to firms engaged in commerce in the amounts set opposite their names, to-wit:

	Direct Purchases	Indirect Purchases	Services
Baird Sheet Metal Works	\$240,683.24	\$29,389.00	\$10,919.29
Bell and Hughes, Inc.	127,472.19	68,109.92	46,372.66
Conditioned Air and Refrigeration	213,351.25	199,589.16	45,681.06
Griffith-Dyer	161,464.15	47,032.06	49,018.24

3. Under date of July 20, 1952, the Valley Group Negotiating Committee, predecessor to Pipe Trades District Council No. 36, acting as the agent of Local Union No. 246, and other Local Unions, entered into a collective bargaining agreement with Northern [105] California Conference of Plumbing and Heating Industry, Inc., which said Conference was acting on behalf (among others) of the Associated Plumbing Contractors of Central California, Inc. A copy of said agreement is attached as Exhibit "A" to the Stipulation of Facts on file herein.

4. In the summer of 1953 a collective bargaining agreement was entered into between plaintiffs and the Valley Group Negotiating Committee acting as agent of Local Union No. 246 and other Local Unions. A copy of said agreement is attached to the Stipulation of Facts on file herein marked Exhibit "B."

5. About the month of April, 1954 said Valley Group Negotiating Committee demanded that plaintiffs sign an agreement amending said Exhibit "B." The document which said Committee demanded that plaintiffs sign is Exhibit "C" attached to the Stipulation of Facts on file herein. Plaintiffs re-

fused to sign said amendment and in about the month of May, 1955 said Valley Group Negotiating Committee caused the employees of plaintiffs to strike, whereupon plaintiffs signed and executed such agreement. Said Exhibit "C" provided in part as follows:

"Add Section 15 (a) to Master Contract:

"(A) Where a labor-management set up exists by agreement between the Local Master Plumbers Association, regardless of its name or organization, and a Local Union affiliated with the Committee requiring that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local make the required payment or payments.

"(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and Local Master Plumbers Association and shall be a part of this agreement.

"Add Section 15 (a) to Master Contract:

"The Individual Employers covered by this agreement consent and agree to be bound by the terms of the effective Health and Welfare Trust Agreement, Pension Trust Agreement and agreement creating any Labor Management set up." [106]

6. On or about the 9th day of February, 1954 Associated Plumbing Contractors of Central Cali-

fornia, Inc., and certain individual employers who were licensed contractors under the laws of the State of California, and the defendant Local Union No. 246, entered into a trust indenture in writing entitled "Plumbing and Pipe Fitting Labor-Management Relations Trust." A copy of said Trust Agreement is attached to the defendants' answer and marked Exhibit "B"; on the 2nd day of August, 1955 said trust was amended and its name was changed to "Plumbing and Pipe Fitting Labor-Management Relations Foundation." A copy of said amendment is attached to defendants' answer marked Exhibit "C."

7. A collective bargaining agreement dated June 17, 1955, was entered into between the District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (successor to the Valley Group Negotiating Committee) acting as the agent (among others) of Local Union No. 246 and Valley Mechanical Contractors Council, Inc., acting as the agent (among others) of Associated Plumbing Contractors of Central California and other individual employers. A copy of this agreement is attached to defendants' answer marked Exhibit "A." Section 16 of said agreement provides:

"Section 16: Labor-Management Relations.

"(A) Where a labor-management set up exists by agreement between the Local Employer, regardless of its name or organization, and a Local Union affiliated with the Union requir-

ing that payment or payments be made, all Individual Employers covered by this agreement shall, if and when they perform work in the territorial jurisdiction of such Local, make the required payment or payments.

“(B) The nature, amount and time of such payment and the territorial jurisdiction of the Local Union shall be set forth in an appendix to this agreement certified by the Local Union and the Local Employer and shall be a part of this agreement.

“(C) The Individual Employers agree to be and are bound by all of the terms and conditions of the effective labor-management set ups and the agreement, trust agreement or charter and by-laws creating and governing any such set up. [107]

“(D) An Individual Employer who works with the tools of the trade shall be irrevocably presumed for all purposes to have worked no more nor less than 160 hours in any month in which an Individual Employer works with the tools of the trade.”

8. Demand was made by District Council No. 36 upon the plaintiffs to execute a collective bargaining agreement in the form of said Exhibit “A” attached to the answer on file herein. Plaintiffs have, and each of them had, refused to execute such agreement or to pay into the trust any of the sums specified in accordance with the terms of said agreement except the amounts specified in the fifth cause of action set forth in the complaint. District Coun-

cil No. 36 is prepared to cause the employees of plaintiffs to strike to obtain the inclusion of Section 16 in said Exhibit "A" in a collective bargaining agreement with the plaintiffs.

Conclusions of Law

1. This Court has jurisdiction of the subject matter and the parties to this action.

2. Plaintiffs are engaged in a business or industry affecting commerce within this district and plaintiffs are employers of employees employed in an industry affecting commerce within the meaning of Section 302 LMRA 1947.

3. Defendants Pipe Trades District Council No. 36, successor to Valley Group Negotiating Committee, Local Union No. 246, and Plumbing and Pipe Fitting Labor-Management Relations Foundation, successor to Plumbing and Pipe Fitting Labor-Management Relations Trust, are representatives of employees who are employed in an industry affecting commerce within the meaning of Section 302 LMRA 1947; and said defendants are representatives of the employees of plaintiffs.

4. Labor-Management Relations Foundation is a representative of the employees of plaintiffs, and payments to Labor-Management Relations Foundation by plaintiffs or any of them constitute payments of monies or other things of value by employers [108] to a representative of their employees employed in an industry affecting commerce.

5. In addition thereto defendant Local Union No. 246 is also a representative of the employees of

plaintiffs. Local Union No. 246 has a beneficial interest in, and partial control over, the disposition of the assets and property of Labor-Management Relations Foundation. Payments by plaintiffs to Labor-Management Relations Foundation constitute payment of monies or other thing of value to Local No. 246 and thereby constitute payment of money or other thing of value by employers to a representative of their employees engaged in an industry affecting commerce.

6. The Trust Agreement of the Plumbing and Pipe Fitting Labor-Management Relations Foundation states that the Board of Trustees is authorized to, and shall have the power to, pay out of the assets of the trust at the sole and exclusive discretion of the trustees for the following purposes among others: "To enforce the collective bargaining agreement and the provisions thereof," and "to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the plumbing and pipe fitting industry * * *." The expenditure of trust monies for the purposes above enumerated relieves Local Union No. 246 of the expenditures of monies for said purposes and to such extent constitutes the payment of monies or other thing of value to Local Union No. 246.

7. None of said payments are for any of the purposes enumerated or permitted by, or under the provisions of, Section 302 LMRA 1947.

8. Plaintiff employers should be enjoined from paying to defendant Labor-Management Relations Foundation, and said defendant Labor-Manage-

ment Relations Foundation should be enjoined from receiving or accepting any payments of monies or other thing of value from plaintiffs. [109]

9. Plaintiff employers should be enjoined from paying to defendant Local Union No. 246, and defendant Local Union No. 246 should be enjoined from receiving or accepting any payments or monies or other thing of value from plaintiffs except for the purposes specified and set forth in Section 302 (c) LMRA 1947.

Judgment

In accordance with the foregoing findings of fact and conclusions of law it is Ordered, Adjudged and Decreed:

1. That plaintiffs, Conditioned Air and Refrigeration Co., a California corporation, Bell and Hughes, Inc., a California corporation, Baird Sheet Metal Works, a California corporation, and Earl Griffith and John Dyer, a co-partnership doing business under the name of Griffith-Dyer, be and they are hereby enjoined and restrained from paying any monies or other thing of value to defendant Labor-Management Relations Foundation.

2. That defendant Labor-Management Relations Foundation be enjoined and restrained from receiving or accepting any payments of monies or other thing of value from plaintiffs, Conditioned Air and Refrigeration Co., a California corporation, Bell and Hughes, Inc., a California corporation, Baird Sheet Metal Works, a California corporation, and

Earl Griffith and John Dyer, a co-partnership doing business under the name of Griffith-Dyer.

3. That plaintiffs, Conditioned Air and Refrigeration Co., a California corporation, Bell and Hughes, Inc., a California corporation, Baird Sheet Metal Works, a California corporation, and Earl Griffith and John Dyer, a co-partnership doing business under the name of Griffith-Dyer be and they are hereby enjoined and restrained from making any payments of monies or other thing of value to defendant Local Union No. 246 except for the purposes specified and set forth in Section 302 (c) LMRA 1947. [110]

4. That Local Union No. 246 be enjoined and restrained from receiving or accepting any payments of monies or other thing of value from plaintiffs, Conditioned Air and Refrigeration Co., a California corporation, Bell and Hughes, Inc., a California corporation, Baird Sheet Metal Works, a California corporation, and Earl Griffith and John Dyer, a co-partnership doing business under the name of Griffith-Dyer, except for the purposes specified and set forth in Section 302 (c) LMRA 1947.

5. The costs of this action are taxed to defendants, and defendants Labor-Management Relations Foundation and Local Union No. 246 are hereby ordered to pay plaintiffs their costs of suit.

6. It Is Further Ordered, Adjudged and Decreed that this judgment shall be stayed pending the filing of an appeal by defendants within the time allowed by law, and if such appeal shall be filed by

defendants this judgment shall be further stayed until decision thereof by the United States Court of Appeals for the Ninth Circuit. If no appeal is filed by defendants or any of them within the time allowed by law, or if such appeal is filed and the decision herein is affirmed by the United States Court of Appeals then and thereupon this judgment shall be in full force and effect.

Dated: November 14, 1956.

/s/ GILBERT H. JERTBERG,
Judge of the U. S. District Court.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Lodged Nov. 2, 1956. Docketed and Entered Nov. 19, 1956. Filed Nov. 14, 1956. [111]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants, Plumbing and Pipe Fitting Labor-Management Relations Foundation, named in the caption herein as Plumbing and Pipe Fitting Labor-Management Relations Trust, Local Union No. 246 of The United Association of Journeymen and Apprentices of the Plumbing and Pipe [112] Fitting Industry of the United States and Canada; Pipe Trades District Council No. 36 of The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and

Paul L. Reeves, and each of them, does hereby appeal to the United States Court of Appeal for the Ninth Circuit from the granting of plaintiffs' motion for summary judgment and the denial of defendants' motion for summary judgment and from the judgment entered herein on the 19th day of November, 1956, and the whole thereof.

Dated: December 3, 1956.

/s/ P. H. McCARTHY, JR.,
Attorney for Appellants.

[Endorsed]: Filed Dec. 13, 1956. [113]

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON APPEAL

Plumbing and Pipe Fitting Labor-Management Relations Foundation, named in the caption herein as Plumbing and Pipe Fitting Labor-Management Relations Trust, Local Union No. 246 of The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Pipe Trades District Council No. 36 of The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting [114] Industry of the United States and Canada, and Paul L. Reeves, and each of them, defendants and appellants above-named, state pursuant to Rule 75(d) of the Federal Rules of Civil Procedure that

the following points will be relied upon on appeal from the Judgment entered herein.

1. The Court erred in granting plaintiffs' motion for summary judgment, and denying defendants' motion for summary judgment.
2. The Court erred in its Findings of Fact.
3. The Court erred in its Conclusions of Law.
4. The Court erred in its Judgment.

/s/ P. H. McCARTHY, JR.,

Attorney for Appellant Defendants.

[Endorsed]: Filed Dec. 13, 1956. [115]

[Title of District Court and Cause.]

STIPULATION DESIGNATING CONTENTS
OF RECORD ON APPEAL AND ORDER
THEREON

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the designated parts of the record of the above-entitled action in the above-entitled Court, hereinafter set out, are the material and relevant parts and shall be the record on appeal in the above-entitled action:

1. Notice of Appeal.
2. Statement of Points Relied Upon on Appeal.
3. Complaint for Injunction.
4. Answer including Exhibits B and C. Exhibit A, a printed booklet is to be transmitted to the

Appellate Court and a copy substituted for the files of the above-entitled Court.

5. Stipulation of Facts,

(a) Also the following portions of Exhibit A, attached to Stipulation of Facts.

Page 1 commencing "Master Contract" through page 3, line 15, ending in "work covered by this agreement."

Page 5 commencing "Section 10" through page 6, line 33, ending in "of the other party."

Page 14 commencing "Section 21" through to the end of the Agreement including signatures.

(b) Also the following portions of Exhibit B, attached to Stipulation of Facts.

Page 1 commencing "Master Contract" through page 2, line 41, ending in "this agreement."

Statement as follows:

"Exhibit B unlike Exhibit A contains no provisions for a Joint Conference Board or arbitration."

Page 11 commencing with "Section 19" through to the end of the agreement, including signature lines.

(c) Also the following portions of Exhibit C, attached to Stipulation of Facts.

Page 1 commencing "Agreement Amending Master Contract" through line 19 ending in "Master Agreement be and the same is hereby amended as follows."

Page 3 commencing line 10 with "Add Section 15(a) to Master Contract" through line 26 ending in "Labor Management set up."

Page 4 commencing line 16 with "In Witness

Whereof" to the end of the agreement including signature lines.

6. Plaintiffs' and Defendants' Motions for Summary Judgment.

7. Memorandum and Order. [117]

8. Findings of Fact, Conclusions of Law and Judgment.

Dated: December 12, 1956.

/s/ P. H. McCARTHY, JR.,
Attorney for Appellant Defendants.

/s/ GEORGE O. BAHRs,
Attorney for Appellee Plaintiffs.

So Ordered:

Dated: December 13, 1956.

/s/ GILBERT H. JERTBERG,
U. S. District Court Judge.

[Endorsed]: Filed Dec. 13, 1956. [118]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 118, inclusive, containing the original

Complaint;

Answer;

Stipulation of Facts;

Motion of Defendants for Summary Judgment;

Motion of Plaintiffs for Summary Judgment;

Memorandum & Order of Court;

Findings of Fact, Conclusions of Law & Judgment;

Notice of Appeal;

Statement of Points Relied Upon on Appeal;

Stipulation Designating Contents of Record on Appeal; & Order Thereon;

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 20th day of February, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk,

/s/ By CHARLES E. JONES,
 Deputy.

[Endorsed]: No. 15445. United States Court of Appeals for the Ninth Circuit. Plumbing and Pipe Fitting Labor-Management Relations Trust, et al., Appellants, vs. Conditioned Air and Refrigeration Co., a corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: February 21, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,445

IN THE

United States Court of Appeals
For the Ninth Circuit

PLUMBING AND PIPE FITTING LABOR-MAN-
AGEMENT RELATIONS TRUST, et al.,

Appellants,

VS.

CONDITIONED AIR AND REFRIGERATION CO.,
a corporation, et al.,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

P. H. McCARTHY, JR.,
518 Balboa Building, 593 Market Street,
San Francisco 5, California,
Attorney for Appellants.

FILED

AUG 19 1957

PAUL P. O'BRYEN, CLERK

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No. 15,445

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PLUMBING AND PIPE FITTING LABOR-MAN-
AGEMENT RELATIONS TRUST, et al.,

Appellants,

vs.

CONDITIONED AIR AND REFRIGERATION Co.,
a corporation, et al.,

Appellees.

REPLY BRIEF ON BEHALF OF APPELLANTS.

**REPLY TO APPELLEES' DISCUSSION
OF APPELLANTS' ARGUMENTS.**

The fact that the employees of a particular employer may have to strike to obtain the socially desirable end of labor-management co-operation does not render the co-operation any less voluntary if and when the strike is successful, or the socially desirable end any less socially desirable.

The strikes that preceded the present United States Steel Agreement and other steel company agreements, the General Motors Agreement and other automobile agreements did not and do not render such agreements other

than voluntary or the present day co-operation between management and labor in such industries any less real.

See *Parkinson Co. v. Bldg. Trades Council*, 154 Cal. 581, 598; 610.

We suggest and submit that when Senator Taft described Section 302 as written to prevent "extortion or a case where the Union representative is shaking down the employer" (Congressional History Labor Management Relations Act, 1947, p. 1311, col. 2) he was not advocating the destruction of Labor-Management Committees set up by the Labor Division of the War Production Board of the United States (Appellants' Opening Brief, pp. 13, 16), or their peacetime counterpart and successors such as the instant trust.

That employer payments to the trust in the instant case are within the realm of legitimate collective bargaining was decided administratively by the General Counsel of the National Labor Relations Board when on two occasions he sustained the dismissal of appellees' unfair labor practice charges numbered 20-CB-404 against appellants' Local Union No. 246 and Paul L. Reeves, charging amongst other things a violation of 8 (b) 3 L.M.R.A., 1947 (29 U.S.C. 158 (b) 3) i.e. that said appellant union by striking to obtain the agreement of the employer to pay into the instant Trust had refused to bargain collectively with the appellees. (R. 47, 48.)

We submit the payments here called for are not within the prohibition of the statute.

**THE TRUST PERFORMS NONE OF THE FUNCTIONS OF A
LABOR ORGANIZATION.**

The vice of appellees' argument, pages 4 thru 10 of its Brief On Behalf Of Appellees is that appellees fail to distinguish between the right, power and authority of "dealing with employers," bargaining and negotiating with employers, and the right, power and authority to enforce the deal made with the employer, the bargain, the collective bargaining agreement when completed.

Subsection 5 of Section 152, Title 27 U.S.C. defines "Labor Organization" as follows:

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, *of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.*" (Emphasis added.)

The important phrase in the foregoing definition is "dealing with employers."

In *Borg v. International Silver Co.*, 11 Fed. (2d) 147 "dealing" is defined at page 150 as follows:

"Dealing implies ordinarily a trade between two opposite parties."

As used in the instant statute "dealing with employers" is to bargain with employers.

The instant statute defines collective bargaining as follows in 29 U.S.C. 158 (d):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation

of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder."

To "negotiate" is defined in *Mason v. Mazel*, 82 C.A. (2d) 769, 777, 187 Pac. (2d) 98, 100 as

"To . . . treat with a view to coming to terms on some matter, as a purchase or sale, a treaty, etc.; to conduct communications or conferences as a basis of agreement . . ."

We submit therefore that the phrase "dealing with employers" means to communicate, confer, treat, trade and bargain with employers for the purpose of coming to an agreement, a treaty between the employees and employers.

That is not a purpose of the trust here involved and the trustees have not by the terms of the trust instrument either expressly or impliedly been given any such right, power, authority or duty.

In so far as "dealing with employers concerning . . . wages rates of pay, hours of employment or condition of work" is involved the "dealing" ended and the "deal" was consummated when the collective bargaining agreement was executed by District Council No. 36 or its predecessor The Valley Group Negotiating Committee and the Employer associations.

In so far as "dealing with employers concerning . . . labor disputes" is involved we find that a "labor dispute"

is defined in Subsection 9 of Section 152, Title 29 U.S.C. as follows:

“The term ‘labor dispute’ includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, charging, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.”

Such a “labor dispute” is likewise resolved and dealt with and the “dealing with employers” ended when the collective bargaining agreement settling the “controversy concerning terms, tenure or conditions of employment” for the ensuing contract period was executed.

In addition, any “controversy concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment” was dealt with and settled and the “dealing with employers” ended when the employers recognized the Valley Group Negotiating Committee and its Successor District Council No. 36 as the sole and exclusive representative of their employees for the purpose of collective bargaining. (R. 50, 53; 59, 60; 62.) (R. 107, Printed Booklet.)

This brings us to “dealing with employers concerning grievances.”

The Trust and the Trustees have no authority expressed or implied to “deal with employers,” i.e. to bargain, treat or negotiate the settlement of any grievance.

The authority given the Trust and Trustees is “to enforce the collective bargaining agreement.” (Section 17, Exhibit A attached to Complaint.) (R. 28.)

In *U.S. v. Gordin*, 287 Fed. 565, "To enforce" is defined at page 572 as follows:

" 'To enforce' means to put or keep in force, to compel obedience to; to cause to be executed or performed, as to enforce laws or rules."

Thus, the power "to enforce the collective bargaining agreement" completely negatives any idea of "dealing," treating, bargaining or negotiating with employers.

The duty "to enforce" precluded "dealing with," treating, bargaining or negotiating with employers or any one else and any attempt so to do would be a direct violation of trust by the Trust and Trustees involved.

It is the deal as made, the collective bargaining agreement the Trust and Trustees must enforce and insofar as the Trust and Trustees are concerned, the collective bargaining agreement is fixed and immutable.

The Courts enforce collective bargaining agreements and the arbitration provisions therein contained and in a very real sense, when the Trust acts to enforce the agreement, it acts in the place and stead of the Courts.

Section 185 (a) Title 29 U.S.C. provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

On June 3, 1957 the Supreme Court of the United States, in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S., 77 S. Ct., 1 L. Ed. (2d) 972 (advance) said:

“Other courts—the overwhelming number of them—hold that § 301 (a) is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. Perhaps the leading decision representing that point of view is the one rendered by Judge Wyzanski in *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137. That is our construction of § 301 (a), which means that the agreement to arbitrate grievance disputes contained in this collective bargaining agreement, should be specifically enforced.” (Pp. 977, 978.)

* * *

“Thus collective bargaining contracts were made ‘equally binding and enforceable on both parties.’ (Id., p. 15.) As stated in the House Report, *supra*, p. 6, the new provision ‘makes labor organizations equally responsible with employers for contract violation and provides for suit by either against the other in the United States district courts.’ To repeat, the Senate Report, *supra*, p. 17, summed up the philosophy of § 301 as follows: ‘Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.’ ”

“Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to

strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." (P. 979.)

* * *

"The question then is, what is the substantive law to be applied in suits under § 301 (a). We conclude that the substantive law to apply in suits under § 301 (a) is federal law which the courts must fashion from the policy of our national labor laws." (P. 980.)

Appellees' misconception and that of the Court below arises from the fact that they both fail to distinguish between the right, power and authority of "dealing with," bargaining and negotiating and the right, power and authority to enforce the deal, bargain and collective bargaining agreement when negotiated.

They further fail to distinguish between the authority to invoke the power to enforce, i.e., make a claim, file a grievance, file an action in a Court and the authority to enforce.

The authority to enforce lies in the Court, not the litigant who invokes the power by filing the lawsuit.

Thus, both the collective bargaining representative of the employees, an employee, the representative of the employers and an employer have the right and, in some instances, the duty to invoke the power of the Trust and Trustees to enforce the agreement as they may invoke the power of a Court, but they do not have the power or

authority "to enforce" the collective bargaining agreement.

We submit that on reason and authority the Trust and Trustees are not, and each of them, is not a "representative" within the meaning of Section 186 of Title 29 U.S.C.

**LOCAL 246 IS NOT A REPRESENTATIVE WITHIN THE
MEANING OF 29 U.S.C. 186 (a) AND (b).**

The appellees and the Court below misconceive the meaning of Section 8(a)(3) (29 U.S.C. 158(a)(3)) of the Labor Management Relations Act.

District Council No. 36, as was its predecessor Valley Group Negotiating Committee, is an association of local unions, labor organizations. Acquisition of membership is through such local unions.

Since the Valley Group Negotiating Committee and its Successor, District Council No. 36, was the representative of the employees within the meaning of Section 158 (a) 3, it could and did provide for membership therein in keeping with its own laws. Section 158 (a) 3 does not, in any way, interfere with the internal operation of a labor organization other than to require that membership be available to all employees on its same terms and conditions (Sec. 158 (a)(3)(A)) and Section 158 (b)(1)(A) specifically provides:

"That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

Thus, the so-called Union Shop Clause does not because it cannot in the instant case make Local 246 a "Representative" within the meaning of 29 U.S.C. 186 (a) and (b).

The test of a "Representative" within the meaning of 29 U.S.C. 186 (a) and (b) is set out in *U.S. v. Ryan*, 100 L. Ed. (advance p. 272).

The answer turns on the extent to which the person or organization participates in the collective bargaining process.

It is clear on this record that Local 246 does not, as a local union, participate at all in the collective bargaining process and hence cannot be a representative within the meaning of 29 U.S.C. 186.

**PAYMENTS TO THE TRUST ARE NOT PAYMENTS OF MONEY
OR OTHER THINGS OF VALUE TO LOCAL 246.**

We are not here dealing with suppositions. We have in the instant case a definite Record and a specific Trust Agreement.

Appellees' hypothetical cases fail, as they must, because they ignore the Record and the Trust Agreement and, in fact, assume the existence of facts and a Trust Agreement materially different from the facts and Trust Instrument before the Court.

The test is not found in the decisions of the Courts dealing with Massachusetts Trusts. The test is found in those decisions dealing with Trusts.

In *Betker v. Nalley*, 140 F. (2d) 171, at page 173, the Court adopts the test laid down in *Warsco v. Oshkosh Savings and Trust*, 183 Wis. 156, 160, 161; 196 N. W. 829, 830 in which the Court says:

“If the donor has full control and dominion over the Trust property, *so that according to the terms of the Trust* he can use it as and when he pleases, the trustee becomes his agent to hold title to property, invest, sell and collect income for him and pay as he directs. The donor has parted with no dominion over his property nor any part thereof *by the terms of the trust* and such agreement is no valid trust agreement.” (Emphasis added.)

Applying this test what are the *terms* of the trust agreement?

The Trust agreement provides:

“All questions pertaining to this agreement, the trust, and their validity, administration and construction shall be determined in accordance with *the laws of the State of California*, and with any pertinent laws of the United States.” (R. 36.) (Emphasis added.)

Under the laws of the State of California the trust here involved is a charitable trust and meets the tests laid down by the Supreme Court of the State of California.

See:

People v. Cogswell, 113 Cal. 129;

Collier v. Lindley, 203 Cal. 641;

Estate of Murphy, 7 C. (2d) 721;

Estate of Tarrant, 38 C. (2d) 42.

The trust agreement further provides:

“The duties, responsibilities, liabilities and disabilities of the Board of Trustees or any Trustee shall be determined solely by the express provisions of this agreement and no further duties, responsibilities, liabilities or disabilities shall be implied.” (R. 34.)

The trust contains no provisions requiring the trustees or any of them to obey or even consider instruction given them by those who appointed them.

Absent such specific provisions in the trust agreement the trustees are required to and must exercise their independent personal judgment. To submit their individual judgment to the collective judgment of those who appointed them would be in direct violation of the provisions of the trust since Article IV section 1 of the Trust Agreement provides:

“Subject only to the limitation hereinafter set out the Board of Trustees are authorized to and shall have the power to pay out the assets of the trust to any person, firm, corporation, association whether incorporated or unincorporated or trust—*at their sole and exclusive discretion* for the general welfare of the Plumbing and Pipe Fitting Industry. . . .” (R. 28.)

The error in appellees’ position arises from the fact that it assumes that all representatives of organized labor and organized employers are essentially dishonest and that they will necessarily violate the trust agreement, violate the law and in general be false to their trust.

This assumption of course aside from being contrary to the Record is false in fact and law.

The Court must assume that the trustees will act in all respects in a lawful and proper manner and will exercise their "sole and exclusive discretion" and will not be subservient to any group of persons in breach of their trust and their obligation as trustees.

Aside from the fact that the law applicable to Massachusetts Trusts, a business device peculiar to the State of Massachusetts, can have no application here the fact is that the trust instrument in the instant case by resting "sole and exclusive discretion" in the trustees specifically negates the proposition that the trustors' or beneficiaries' instructions are to be obeyed.

One cannot have "sole and exclusive discretion" if one is required to obey the instructions of a third party. The two propositions are mutually exclusive.

Payments to the trust are not we submit payments of money or other thing of value to Local 246 or any other entity except the trust.

CASES RELIED UPON BY APPELLANTS.

Appellees and the Court below err when they say:

"In the Essex case, payments by the employer were to be made to six trustees of a welfare fund. From aught that appears in the opinion of the Court the Trust providing for the welfare fund was in strict compliance with the requirement of Section 302 (c) (5)."

Appellees' Brief, p. 20. (R. 92.)

The proviso of Section 302 (c) 5 (B) (29 U.S.C. 186 (c) 5 (B)) states that:

“(B) the detailed basis on which payments are to be made is specified in a *written agreement with the employer. . . .*”

In the *Essex* case (*United Marine Division v. Essex Transportation Company*, 216 Fed. (2d) 410) there was no written agreement with the employer, i.e. Essex Transportation Company.

The Court in its opinion states:

“The plaintiff alleges that the defendant company *orally agreed to make payment to six trustees of a welfare fund.*” (P. 411.)

Thus the Court in the *Essex* case properly considered the effect not of the proviso of 302 (c) 5 (B) (29 U.S.C. 186 (c) 5 (B)), but the provisions of 302 (a) and (b) (29 U.S.C. 186 (a) and (b)) which are the portions of the statute under which this action is proceeding.

While not binding in this Court we suggest and submit that the *Essex* case, absent anything to the contrary, is persuasive.

CONCLUSION.

In the language of the Court in the *Essex* case:

“ ‘We think that the promise in this case is outside the evil which the Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do

not think we should enlarge an application of the statute to void the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations.' '' (P. 413.)

Appellants respectfully submit that the decision of the Court below should, as it was in the *Essex* case (*supra*), be reversed.

Dated, San Francisco, California,
August 12, 1957.

Respectfully submitted,
P. H. McCARTHY, JR.,
Attorney for Appellants.

No. 15,445

IN THE

United States Court of Appeals
For the Ninth Circuit

PLUMBING AND PIPE FITTING LABOR-
MANAGEMENT RELATIONS TRUST, et al.,

Appellants,

VS.

CONDITIONED AIR AND REFRIGERATION
Co., a corporation, et al.,

Appellees.

On Appeal from Order and Judgment of District Court.

BRIEF ON BEHALF OF APPELLEES.

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FILED

JUL 26 1957

PAUL P. O'BRIEN, CLERK

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BRIEF ON BEHALF OF APPELLEES.

JURISDICTION.

We note with interest that no question is raised by appellants as to whether there is sufficient interstate commerce involved to confer jurisdiction upon the court.

This is as it should be. Although there was a challenge to the jurisdiction of the court below (Answer, Second Defense, R. 10, 11), the opinion of the District Court correctly declared:

“The fact that the jurisdictional amount of \$3,000 was expressly excluded from the pro-

visions of Sections 301 and 303 of the Labor Management Relations Act, 1947, as Amended, is not persuasive that the failure to make such exclusion in Section 302 operates to include such jurisdictional requirement. Sections 301 and 302 relate to suits for damages by private persons. Section 302 (a) and (b) make it unlawful to do the things proscribed by the provisions thereof. *It is public rights which are being protected*, and in my opinion the provisions of Section 302(e) grant jurisdiction to this court without regard to the sum or value in controversy if the volume of commerce of each plaintiff is not de minimis.” (Emphasis supplied.) (R. 73.)

The court below in its opinion referred to the decision of the Supreme Court of the United States in *NLRB v. Fainblatt*, 306 U.S. 601.

In that case the court said:

“The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce . . .”

As this action is an action to protect and enforce a *public right* and *public policy* which Congress has declared in Section 302 of the statute and not merely an action to recover money paid under duress, the court should apply and carry out the public policy declared in Section 302 if there is any conceivable basis for the assertion of jurisdiction.

The facts here show ample commerce for the assertion of jurisdiction. (R. 71.)

DISCUSSION OF APPELLANTS' ARGUMENTS.

Appellants make three principal points in their opening brief. These will be discussed in the order of their presentation.

First: Appellants argue that cooperation between labor and management is desirable. They spend a considerable portion of their brief (pp. 5-19) discussing the "serious and pertinent social interests involved."

We do not yield to appellants in lauding the desirability of cooperation between labor and management. The argument, however, conveniently ignores the allegations of the complaint that

"Defendants are attempting to *compel* plaintiffs to pay and deliver money and other things of value to defendant 'Trust' ". (R. 5.) (Emphasis supplied.)

and

"to defendant 'Local Union No. 246' ", (R. 6.)

"and will, unless restrained by this Court, cause the aforesaid employees of plaintiffs to *strike* and cease working for plaintiffs unless and until plaintiffs pay and deliver said money and other things of value * * *." (Emphasis supplied.) (R. 6.)

The Answer alleges (R. 15) that

"Pipe Trades District Council No. 36 as the collective bargaining representative of the employees of plaintiffs, and each of them, covered by the 1952, 1953 Collective Bargaining Agreement and 1954 Amendment to the 1953 Collective

Bargaining Agreement *is prepared to cause said employees to strike* to obtain the inclusion of said Section 16 of Exhibit A in a Collective Bargaining Agreement with said plaintiffs, and each of them.” (Emphasis supplied.) (R. 15 and 16.)

Thus the “cooperation” involved in the present case is not entirely voluntary.

We do not know what considerations or pressures, economic or otherwise, led the employers, members of Associated Plumbing Contractors of Central California, Inc., to make and enter into the Trust Agreement.

We do say, however, that if the “cooperation” which appellants extol involves the payment of money or other things of value by an employer to a representative of his employees *the statute forbids it*. The statute makes no distinctions between voluntary and involuntary payments. *All* such payments are forbidden unless specifically listed under Section 302 (c) as excepted from the statute.

THE TRUST IS A REPRESENTATIVE OF PLAINTIFFS' EMPLOYEES BECAUSE IT PERFORMS SOME OF THE FUNCTIONS OF A LABOR ORGANIZATION.

Appellants carefully and painstakingly point out that the Valley Group Negotiating Committee and its successor, District Council No. 36, were *recognized* in the collective bargaining agreements as the *sole* and *exclusive* representative of plaintiffs' employees. (Appellants' Brief, p. 3.)

A mere *recital* in a contract cannot change the *facts*, however, and if the Plumbing and Pipe Fitting Labor-Management Relations Trust was, *in fact*, a representative of the employees of plaintiffs, any payment to it by plaintiffs was *forbidden* by the statute.

With respect to the meaning and definition of the term "representative" we quote from the opinion of the District Court as follows:

"The Labor Management Relations Act of 1947, as Amended, states: 'The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in sub-chapter II of this chapter as amended by this chapter.' Section 142, subsection 3, U.S.C.A. Title 29.

Section 152, subsection 4, Title 29 U.S.C.A., states: 'The term "representative" includes any individual (87) or labor organization.' Subsection 5 of Section 152 states: 'The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'" (R. 78.)

When we examine the purposes and functions of the "trust" here involved we find that it is in fact and in law a "labor organization" and "representative" to which the various local unions, the Valley Group and the District Council have transferred some of the functions normally and traditionally performed by unions.

It is the function of a union not only to negotiate collective bargaining agreements but to *police* and *enforce* them when negotiated.

For example: The Labor Management Relations Act itself defines collective bargaining as follows (Sec. 8(d)):

“For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, *or the negotiation of an agreement, or any question arising thereunder.*” (Emphasis supplied.)

Thus the handling of *grievances and disputes under a contract* is included within the statutory *definition of collective bargaining*.

This is exactly what the “Trust” was set up to do. In order to spare the court unnecessary reading of a duplication of discussions we content ourselves with quotations from the opinion below as follows:

“Is the Plumbing and Pipe-fitting Labor Management Relations Foundation a ‘representative’ of the employees of plaintiffs? The Trust recites that ‘Whereas there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor or improper work and workmanship, and

‘Whereas, the absence of such effective machinery is producing chaos in the Plumbing and

Pipe-fitting industry and is endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confidence of the public in the employers and in the plumbing and pipe-fitting industry.

‘Now, therefore, to correct this situation, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees to restore the trust and confidence of the public in the employers and the plumbing and pipe-fitting industry, this Trust is created.’

“The stated purposes of the Trust are to perform and perfect ‘an organization for the purpose of improving the relationship between the employers and employees making up the plumbing and pipe-fitting industry and the general public, and to enforce the collective bargaining agreement and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the (98) Plumbing and Pipe-fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the plumbing and pipe-fitting industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship’

“The only specific purposes of the Trust are to enforce the collective bargaining agreement and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States

and Canada, and to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the plumbing and pipe-fitting industry. *The other stated purposes are vague and uncertain.* (Emphasis supplied.)

“The Trust agreement states that the Board of Trustees is authorized to, and *shall have the power to pay out of the assets of the Trust*, at the sole and exclusive discretion of the trustees, for, among other things, ‘to protect the wages, rates of pay, hours of employment, and other conditions of employment of the employees in the plumbing and pipe-fitting industry, * * * to enforce the collective bargaining agreements and the provisions thereof, covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada.’ The Board of Trustees is authorized ‘to employ such executive, administrative, accounting, clerical, secretarial and legal personnel and other employees and assistants, as may be necessary in connection with the carrying out of the Trust and to pay or cause to be paid, out of the Trust the compensation and (99) expenses of such personnel and assistants the cost of office space, furnishings and supplies and other expenses of the Trust.’

“It must be presumed that the Trust will carry out the specifically stated provisions for which it was formed, and which are above quoted. The Trust comes within the term ‘labor organization’ as defined in Subsection 5 of Section 152, Title 29 U.S.C.A., and is a ‘representative’ of the employees under Section 4 of Section 152. *It is my*

view that the Trust is a 'representative' of the employees of the plaintiffs." (Emphasis supplied.) (R. 88-91.)

After reading this clear and convincing statement in the opinion below it must be apparent that appellants' unqualified assertion (p. 21 Appellants' Brief) that the Trust "has no connection with the collective bargaining process at all" is so obviously incorrect that it casts doubt on appellants entire argument on this subject.

Appellants' argument (Appellants' Brief, pp. 25-28) that the Trust is not a "representative" within the meaning of Section 302 is circuitous. Reduced to its simplest terms, the argument advanced is that a representative is essentially an agent while a trustee is not; therefore, the Trust cannot be a representative. The fallacy of this reasoning is that it begs the very question in issue.

The Trust in this case is a representative *because it performs some of the functions of a representative as defined by law.*

Appellants devote one entire portion of their brief (pp. 28-31) to arguing that the Trust could not be a "representative" because it has been set up as an independent, quasi-judicial agency to hear and settle disputes.

Appellants state in their brief:

"One of the powers of the Joint Conference Board and therefore the Trust is to hear disputes and differences which may arise in the enforce-

ment of interpretation of the agreement.” (Emphasis supplied.) (Appellants’ Brief, p. 29.)

It will be noted that the most that appellants claim is that *one* of the powers of the Trust is to hear disputes and differences which may arise in the enforcement or interpretation of the agreement.

They do not go so far as to say that this is the *only* function of the Trust. They could hardly do so in view of the explicit language of the Trust declaring that “there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be *policed* and *enforced* * * *”, and declaring that

“The *stated purposes* of this Trust are * * * to *enforce* the collective bargaining agreement * * * to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the plumbing and pipe-fitting industry. * * *”

From this it will be seen that the Trust performs duties other than those of a judicial nature or acting as arbitrator. Those duties, by *definition of the statute*, are functions of a “*labor organization*” and a “*representative*”.

Even if, as appellants claim, the Trust were truly an independent agency (which we will later show it is not) if it performs the functions of a labor organization and *acts* as a representative of the employees, *the statute forbids employer payments to it.*

LOCAL 246 IS A REPRESENTATIVE OF THE EMPLOYEES
OF PLAINTIFFS.

Although appellants stoutly maintain that Valley Group Negotiating Committee and its successor District Council No. 36 are the *sole* and *exclusive* collective bargaining representatives of the employees of plaintiffs, it is apparent that *Local 246 is also a representative of the employees of plaintiffs.*

An examination of the 1955 collective bargaining agreement attached to the answer as Exhibit A will show many instances in which local unions (including Local 246) were referred to and clothed with powers to act and, in fact, required to act as the representative of plaintiffs' employees.

The court below in its opinion (R. 79-88) referred to and quoted these many instances and we will not burden this court by repeating them here.

In connection with Section 5 of the collective bargaining agreement entitled, "Union Membership" (R. 81), it will be noted that this section requires that all employees, as a condition of employment, shall apply for and become members of and maintain membership in the *Local Union* (in this case Local 246). It is axiomatic that a contract should be interpreted so as to conform to law, if possible. Under the law it is not permissible to require membership in any union *unless it is a representative of the employees.* (LMRA 1947 Sec. 8(a)(3).) The contract itself is therefore proof that Local 246 was and is a representative of the employees.

As the court below found, the conclusion is incapable that *Local 246 was and is a representative of the employees of plaintiffs.*

PAYMENTS TO THE SO-CALLED TRUST ARE PAYMENTS OF MONEY OR OTHER THING OF VALUE TO LOCAL 246.

Now we come to the question whether payments to the Trust are payments of money or a thing of value to Local 246. Reduced to simplest terms the proposition of law is this:

Suppose that Local 246 wanted to exact a payment from employers of employees it represented. Section 302 of the statute forbids payment directly to Local 246.

If Local 246 said, "Pay this money to X who will do anything I want done with it", it is obvious that the payment, while in *form* to another was in *fact* a payment to Local 246 which had ultimate dominion and control over the disposition of these monies. No court, we believe, could help but conclude that this constituted a payment of money or other thing of value to Local 246.

We may borrow an analogy from inheritance tax, or estate tax law. If a person has a power of appointment which it is possible to exercise in his own favor, the power of appointment is taxable.

Even though an insurance policy is payable to a specified beneficiary it is treated differently according to whether the designation of beneficiary is irrevoc-

cable or whether the insured has reserved the right to change the beneficiary. Thus the *power to control* the disposition of moneys is taxable as property under the Federal and California laws.

It is most certainly a thing of value under these laws, and should also be under Sec. 302.

Now, suppose that Local 246 said to the employers of its members, "Pay this money to X who will do anything with it *we jointly* agree upon. We will build up a pot of money and then *we* will figure out what we will do with it. X will do as we tell him or we will fire him and replace him." X in this example is not a true trustee for two reasons: (1) There is no definite statement of the purpose of the trust. (2) The trustee is removable at the pleasure of the so-called trustors.

While the hypothetical case above set forth for purposes of illustration may possibly have over-simplified the matter, we believe that fundamentally and basically the facts of the case now before the court are not substantially different in any important respect.

1. Although there is a trust instrument, the purposes of the Trust are broad, vague and practically unlimited. In *fact* Local 246 and the employers can use the money for any purpose they agree upon.

2. The trustees are subject to removal and replacement at the pleasure of the parties appointing them. Ultimate control over disposition of the Trust fund is vested, not in the trustees, but

in the parties appointing them. They are therefore not trustees but mere agents.

The differences between a trust and a mere agency were pointed out by appellees themselves. In particular, one of appellants' citations illustrates the whole point of our argument.

We quote from page 27 of appellants' brief:

"The powers and duties of a trustee are radically different from those of an agent. *The agent's duty is primarily to his principal* for whom he acts and to whom he must account to the cestui que trust, although his authority comes from another. The agent represents and acts for his principal, but a *trustee has no principal* and cannot render the creator or beneficiary of the trust liable for his contracts. (Emphasis supplied.) (2 C.J.S. 1035.)"

As shown by appellee's own citation of authority, a true *trustee has no principal* but is guided solely by the *duties specified in the trust instrument* creating the trust. Such are not the facts here.

The question whether persons designated trustees are actually trustees or merely *agents or servants who hold legal title to property for the convenience of their principals* has frequently been considered in cases involving Massachusetts trusts. We quote from *Goldwater v. Altman*, 210 Cal. 408 at 416, as follows:

"Generally, stated, a trust of this nature is created wherever several persons transfer the legal title in property to trustees, with complete power of management in such trustees free from the control of the creators of the trust, and the

trustees in their discretion pay over the profits of the enterprise to the creators of the trust or their successors in interest. As thus defined it is apparent that such a trust is created by the act of the parties and does not depend on statutory law for its validity. In the case of *Hecht v. Malley*, 265 U. S. 144, 146 (68 L. Ed. 949, 44 Sup. Ct. Rep. 462, 463), Mr. Justice Sanford referred to such organizations as follows:

‘The “Massachusetts trust” is a form of business organization, common in that state, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an instrument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

‘Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. *If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a part-*

nership relation between the certificate holders is created.'

“The leading case in Massachusetts where this so-called control test is fully discussed in *Williams v. Inhabitants of Milton*, 215 Mass. 1 (102 N.E. 355). In that case the question involved was whether the Boston Personal Property Trust was to be taxed as a partnership or as a trust. The court, after discussing certain cases holding the particular trust therein involved created a partnership, and others where it had been held that a trust had been created, stated (102 N.E. 357) that the distinction ‘lies in the fact that in the former cases the certificate holders are associated together by the terms of a “trust”, and are the principals *whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property, the property is their property*, they are the masters; while in *Mayo v. Moritz* (151 Mass. 481 24 N.E. 1083), where it was held the instrument created a trust), on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo v. Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them.’ ” (Emphasis supplied.)

Let us apply the above principles to the case at bar.

Section 2 of the Trust reads as follows:

“The Trustees appointed by the Associated Plumbing Contractors of Central California, Inc.

shall be appointed in writing and *shall serve at the pleasure of said Associated Plumbing Contractors of Central California, Inc.* The Trustees (20) appointed by the Union shall be appointed by the Union in writing and *serve at the pleasure of said Union.* Each original Trustee shall sign this Trust Agreement or a duplicate thereof, and such signature shall constitute his acceptance of office.” (Emphasis supplied.)

Under the principles announced in *Goldwater v. Altman, supra*, and particularly the quotation from *Williams v. Inhabitants of Milton, supra*, the power of removal and replacement of the trustees is such ultimate control over the trust and trust estate that those who exercise such power are the

“*principals* whose instructions are to be obeyed by their agent who, for their convenience, holds the legal title to their property. *The property is their property*, they are the masters. * * *” (Emphasis supplied.)

Thus this device not being a true trust, *legal and equitable ownership of the trust assets is vested jointly in the employer association and in the union.* They are just as much co-owners of the trust property and partners in its management and control as were the certificate holders in the Massachusetts trust cases. For these reasons payments by employers into the trust fund constitute payments of a thing of value to a representative of their employees.

We realize that many trusts *conforming* to the requirements of Section 302 provide for the removal and replacement of trustees. Those trusts, however,

have their purposes so *clearly spelled* out that they *must* be used *solely* for the benefit of *employees and their dependents*. The power of removal and replacement of trustees of such trust could *never* be exercised by a union to divert the Trust funds *to its own benefit without violating the Trust*.

It is the combination of (1) indefinite, almost unlimited purposes of the Trust, with (2) the power of removal and replacement which makes employer payments into the instant Trust payments of a "thing of value" to the Union.

We have seen that the so-called trustors in the case now before the court exercise absolute control over the trustees through the power of removal and replacement. Let us now examine the *purposes* of the Trust.

The Trust provides:

"Section 1. Subject only to the limitations hereinafter set out the Board of Trustees are authorized to and shall have the power to pay out the assets of this Trust to any person, firm, corporation, association whether incorporated or unincorporated or trust *at their sole and exclusive discretion for the general (23) welfare of the Plumbing and Pipe Fitting Industry* and without in any way limiting the foregoing for the purpose of improving the relations between employers and employees making up the Plumbing and Pipe Fitting Industry, and the general public and to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry, to protect the general public from imperfect,

improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship, to enforce the collective bargaining agreements and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.” (Emphasis supplied.) (R. 28.)

It is apparent from the above language that the trust property can be used *for any purposes the Union and the employer association agree upon*. This combination of broad and indefinite purposes, together with ultimate direction and control over the trustees through the power of removal and replacement we believe requires the following conclusions:

1. No trust was created.
2. The so-called trustees are mere agents.
3. Title and control of the Trust assets were vested jointly in the Union and the employers' association.
4. Any payments into such fund were payments to a “representative” forbidden by the statute.

The conclusion that no true trust was created is further supported by the fact that there are *no beneficiaries capable of enforcing the so-called Trust* except the parties who are themselves the founders and creators of the Trust, namely, the employer association and Local 246.

CASES RELIED ON BY APPELLANTS.

Counsel for appellants refer to certain decisions in support of their position. In order not to duplicate the work of this court we content ourselves with reproducing the discussion of these cases in the opinion below:

“The defendants have cited the cases of *United Marine Division v. Essex Transportation Company*, 216 Fed. 2d 410; *Rice-Stix Dry Goods Company v. St. Louis Labor Health Institute*, D.C.E. Mo. 22 LRRM 2528; *People v. Cilento*, 143 N.Y.S. 2d 705; and *Bay Area Painters and Decorators Joint Committee, Inc. v. Orack*, 102 C A 2d 81. In the *Essex* case, payments by the employer were to be made to six trustees of a welfare fund. From aught that appears in the opinion of the Court the Trust providing for the welfare fund was in strict compliance with the requirement of Section 302 (c) (5). Admittedly, the Trust here involved does not so comply. In the *Rice-Stix* case, the Court concluded that the Health Institute was a corporation independent of the labor union which was a representative of the bargaining unit of the employees of the plaintiff. The fund created was to be used for health purposes. In neither of the cases was there a trust agreement containing provisions such as the quoted provisions of the Trust here in question. The *Cilento* case involved a construction of the Penal Statute of the State of New York, and in my opinion, the correct decision was reached under the facts and the applicable law.

“In the *Orack* case, the Court determined that the agreement in question did not constitute a monopoly or a restraint of trade under the law

of the State of California. It did not involve Section 302 of Title 29 U.S.C.A. (101).” (R. 92.)

CONCLUSION.

The main effort of appellants’ brief appears to consist in a determined plea for approval of the “Trust” on the grounds that it serves a socially desirable purpose. But what this argument boils down to is simply a contention that Section 302 (c) (5) *ought* to permit trust funds for the purpose of enforcing collective bargaining agreements, and that, therefore, the statute should be so construed. We submit that appellants’ argument should be addressed to the Congress and not to the courts. The courts, in performing their proper judicial functions, cannot construe this statute as claimed by appellants.

It is respectfully submitted that the court below acted properly in carrying out the policies announced by Congress in the manner specified by the statute by issuing the injunction in this case and its order and decision should be affirmed.

Dated, San Francisco, California,
July 18, 1957.

Respectfully submitted,

ROTH AND BAHRS,

PAUL K. DOTY,

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Attorneys for Appellees.



No. 15,445

IN THE

United States Court of Appeals
For the Ninth Circuit

PLUMBING AND PIPE FITTING LABOR- MANAGEMENT RELATIONS TRUST, et al., vs. CONDITIONED AIR AND REFRIGERATION Co., a corporation, et al.,	}	<i>Appellants,</i> <i>Appellees.</i>
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On Appeal from Order and Judgment of District Court.

BRIEF ON BEHALF OF APPELLANTS.

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FILED

JUL - 1 1957

PAUL P. O'BRIEN, CLERK



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vs.	
CONDITIONED AIR AND REFRIGERATION Co., a corporation, et al., <i>Appellees.</i>	

On Appeal from Order and Judgment of District Court.

BRIEF ON BEHALF OF APPELLANTS.

JURISDICTION.

This action arose under the provisions of Section 302, subdivisions (a) and (b) of Labor Management Relations Act, as amended (29 U.S.C. sec. 186) and jurisdiction of said action was conferred upon the Court below by the provisions of Section 302 Subdivision (e) LMRA 1947 (paragraphs 1 and 2 of the complaint for injunction). (R. 4.)

Defendants and Appellants are——

Plumbing and Pipe Fitting Labor-Management Relations Foundation, a Trust, (R. 10, 17) hereinafter referred to as Foundation or Trust.

Local Union No. 246 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, a local labor union, a labor organization, hereinafter referred to as Local Union or Local 246. (R. 4, 5, 10.)

Pipe Trades District Council No. 36 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada is an association of labor unions, a labor organization, hereinafter referred to as District Council No. 36 or District Council. (R. 11.)

Paul Reeves was an officer of Local No. 246 and District Council No. 36. (R. 5, 11.)

Appellees and Plaintiffs are four contractors who separately and individually collectively bargained with the District Council or its predecessor as an Employer, hereinafter called Employer or Employers. (R. 45, 46.)

The Court has jurisdiction to review the judgment and order in question under the provisions of Title 28 United States Code, Section 1291.

STATEMENT OF THE CASE.

Section 302(a) of the *Labor Management Relations Act, 1947*, as amended, provides as follows:

“It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.”

Section 302(b) of the *Labor Management Relations Act*, 1947, as amended, provides as follows:

“It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, from the employer of such employees any money or other thing of value.”

The collective bargaining agreement of the Valley Group Negotiating Committee (a labor organization, recognized as the sole and exclusive collective bargaining representative of all employees of the Individual Employer performing work covered by the collective bargaining agreement) (R. 50, 53; 59, 60; 62) did and the collective bargaining agreement of District Council No. 36, its successor (a labor organization, similarly recognized as such sole and exclusive collective bargaining representative of all said employees) (R. 107 Printed Booklet), provides that each Individual Employer, covered by the collective bargaining agreement, on work covered by said collective bargaining agreement, performed in the counties of Fresno, Madera, King and Tulare of the State of California, shall pay into the Plumbing and Pipe Fitting Labor-Management Relations Foundation (a Trust) ten (10¢) cents per hour for each hour worked by each employee of each Individual Employer covered by the said collective bargaining agreements.

The Plumbing and Pipe Fitting Labor-Management Relations Foundation (a Trust) was not created by the said Valley Group Negotiating Committee or District Council No. 36. (R. 21, 39, 40.)

The Plumbing and Pipe Fitting Labor-Management Relations Foundation (a Trust) was created by, and its

trustors are, Associated Plumbing Contractors, Inc. (a non-profit membership corporation composed of Individual Employers, Contractors licensed by the Contractors' State Licensing Board of the State of California), Individual Employers similarly licensed but not members of said Association, and Local Union No. 246 (a labor organization, a local union). (R. 21, 39, 40.)

The basic issue is whether such payments into the trust, the Plumbing and Pipe Fitting Labor-Management Relations Foundation, or the agreement so to do, is a payment of money or agreement to pay money to a representative of the Individual Employers' employees in violation of said Section 302(a), and whether the receipt and acceptance of such payments by the trust, the Plumbing and Pipe Fitting Labor-Management Relations Foundation and Its Trustees, or the agreement so to do is a receipt or acceptance of or agreement to accept money by a representative of the Individual Employers' employees in violation of said Section 302(b).

In other words, is the Trust or the Trustees, or both, Representatives of employees within the meaning of the Act.

Appellants maintain the Trust is not and each Trustee is not such a representative. Appellees maintain the Trust is and each Trustee is such a representative.

SPECIFICATION OF ERRORS.

1. The Court erred in granting plaintiffs' motion for summary judgment, and denying defendants' motion for summary judgment.

2. The Court erred in its Findings of Fact.
 3. The Court erred in its Conclusions of Law.
 4. The Court erred in its Judgment.
-

ARGUMENT.

INTRODUCTION.

Since the decision in this case will not only affect the immediate parties but indirectly the hundreds of Labor-Management trusts, non-profit corporations and Committees, as well as Apprenticeship and Training Funds, Industrial Safety Committees, Grievance Committees, Arbitrations and many other aspects of the employer-employee relationship, we think it necessary and advisable not only to set out and discuss those decisions of the Courts which appear to counsel to be of assistance in arriving at a conclusion, but the legislative history of Section 302 of the *Labor-Management Relations Act of 1947*, and the serious and pertinent social interests involved as well as the impact of Labor-Management cooperation on the economic life of our country.

THE TRUST INSTRUMENT.

The trust instrument recited that the trustors—

“ . . . are desirous of forming and perfecting an organization for the purposes of improving the relations between the employers and employees making up the Plumbing and Pipe Fitting Industry, and the Plumbing and Pipe Fitting Industry and the general public, and to enforce the collective bargaining agree-

ment and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, to protect the wages, rates of pay, hours of labor and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry and to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship.”

(R. 22.)

and that—

“ . . . there is presently no effective machinery whereby the provisions of applicable collective bargaining agreements can be policed and enforced and whereby the general public can be protected from imperfect, improper and unsanitary installation, poor or shoddy materials or poor or improper work and workmanship.”

(R. 22, 23.)

and that—

“ . . . the absence of such effective machinery is producing chaos in the Plumbing and Pipe Fitting Industry and is endangering the wages, rates of pay, hours of labor and other conditions of employment of the employees and destroying the trust and confidence of the public in the employers and in the plumbing and pipe fitting industry.”

(R. 23.)

and that—

“ . . . to correct this situation, to protect the wages, rates of pay, hours of labor and other conditions of

employment of the employees, to restore the trust and confidence of the public in the employers and the plumbing and pipe fitting industry, this Trust is created.”

(R. 23.)

The truth of these recitations as a fact is nowhere questioned by plaintiffs.

The trust instrument authorizes the trustees to pay out the assets of the trust.

“... for the general welfare of the Plumbing and Pipe Fitting Industry and without in any way limiting the foregoing for the purpose of improving the relations between employers and employees making up the Plumbing and Pipe Fitting Industry, and the general public and to protect the wages, rates of pay, hours of labor, and other conditions of employment of the employees in the Plumbing and Pipe Fitting Industry, to protect the general public from imperfect, improper and unsanitary installations, poor or shoddy materials and poor or improper work and workmanship, to enforce the collective bargaining agreements and the provisions thereof covering work within the jurisdiction of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada.”

(R. 28.)

The Trust instrument provides—

“The Trust shall be administered by a Board of Trustees which shall consist of five (5) Trustees appointed by the Associated Plumbing Contractors of

Central California, Inc. and five (5) Trustees appointed by the Union.”

(R. 23, 24.)

“The Trustees appointed by the Associated Plumbing Contractors of Central California, Inc. shall be appointed in writing and shall serve at the pleasure of said Associated Plumbing Contractors of Central California, Inc. The Trustees appointed by the Union shall be appointed by the Union in writing and serve at the pleasure of said Union. Each original Trustee shall sign the Trust Agreement or a duplicate thereof, and such signature shall constitute his acceptance of office.”

(R. 24.)

The number of Trustees was later increased to twelve (12), six (6) appointed by the Association and six (6) appointed by the Union. (Exhibit C, Ans. p. 2.)

The trust instrument likewise provides for the bonding of trustees and employees of the trust (R. 30, 31) and for annual audits which shall be available for the inspection of all interested persons. (R. 31.)

In addition, to clearly differentiate, separate and set the trust apart from its creators and beneficiaries, the trust instrument provides:

“Neither the Employer, any Individual Employer, The Unions, any individual employee nor any other beneficiary shall have any right, title or interest in the Trust other than as specifically provided in this agreement, and no part of said fund shall revert to the Employer or any Individual Employer. Neither the Trust nor any payments to the Trust shall be in

any manner liable for or subject to the debts, contracts or liabilities of Employer or Union or of any Individual Employer, or any individual employee."

(R. 26, 27.)

"Neither the Employer, any Individual Employer, the Union nor any individual employee shall be liable or responsible for any debts, liabilities or obligations of the Trust or the Board of Trustees."

(R. 27.)

"The duties, responsibilities, liabilities and disabilities of the Board of Trustees or any Trustee shall be determined solely by the express provisions of this Agreement and no further duties, responsibilities, liabilities or disabilities shall be implied."

(R. 34.)

"The Board of Trustees shall not be liable for the acts or omissions of the Employer or any Individual Employer signatory hereto, or the Union signatory hereto."

(R. 34.)

"Neither the Union, nor any member, officer, agent, employee or committee member of the Union shall be liable to make payments into the Trust or be under any other liability to the Trust except to the extent that he may incur liability as an Individual Employer or as a trustee as herein provided, or both".

(R. 27.)

"Neither the Employer, any Employer association or Individual Employer represented by Employer,

any employer representative nor the Union or any Union representative or member of employee represented by the Union shall be liable in any respect for any of the obligations of the Board of Trustees because any Trustee member or members are in any way associated with any such Employer, Employer Association, Individual Employer, or Union."

(R. 35.)

So that no trustee may directly or indirectly profit from this trust, the Trust Instrument provides:

"The Trustees shall be reimbursed out of the Trust for expenses incurred by them in attending meetings or in the performance of any other duty or act pursuant to this Agreement in such amount as the Board of Trustees may from time to time determine. *No Trustee shall receive any fee for his services as a Trustee*, provided, however, that nothing herein contained to the contrary shall prevent or impede the employment by the Board of Trustees of any Trustee or the payment of any sum to or for any Trustee for services other than as Trustee". (Emphasis added.)

(R. 35.)

HISTORICAL BACKGROUND OF LABOR MANAGEMENT RELATIONS.

It has well been said that there are three types of labor-management relationships.

"(a) *Armed truce*: A relationship in which the parties are convinced that their objectives are in fundamental conflict, resulting in a struggle for power between them and a great deal of competition for worker loyalties.

(b) *Working harmony*: A relationship in which the parties find that they have common interests in fairly broad areas, and where they see the advantages of compromise in areas of conflicting interest.

(c) *Union-management cooperation*: A relationship where the interests of the parties in pursuing their objectives are identical in most important respects and where there is active cooperation in increasing sales, lowering costs and solving production problems."

Research on Labor-Management Relations Report
of Conference held February 24-25, 1949 at Industrial Relations Section, Princeton University,
by Myers and Turnbull.

While this description is useful in classifying the different types of relationships between management and labor it also provides a quick summary of the various steps through which labor and management have in some cases, as in the instant case, progressed but in most cases are progressing.

These classifications set out the classic history of the evolution of labor-management relations in general.

The employees and employers here involved have passed through stages (a) and (b) and on February 9, 1954 when the trust, the Plumbing and Pipe Fitting Labor-Management Relations Foundation, was created, entered hesitantly but confidently into stage (c), one of active cooperation.

Appellants reject the assumption that labor relations and collective bargaining must forever remain an Armed Truce, or, at best, achieve only Working Harmony.

Thus, as stated in "Human Relations in Modern Business", "*A Guide For Action Sponsored By American Business Leaders*", published by Prentice-Hall, Inc.:

"A genuine attitude of trusteeship, or social responsibility, on the part of both labor and management, would do much to better the tone of modern society. It would lessen the conflicts between capital and labor. There would be more of a sense of co-operation for common objectives, and less of the trend toward economic warfare. A factory would be recognized as a true community rather than a battleground where an armed truce prevails.

"An attitude of trusteeship could modify certain forms of competition that business men and others condemn as antisocial. The nineteenth century saw society swing between two extremes; a ruthless competition that tended to exploit labor, disregard the consumer, and crush weaker business men; and a trend toward economic concentration, which fostered monopoly, industrial autocracy, and economic instability. In an atmosphere of trusteeship, the real merits of competition—the fostering of initiative and resourcefulness, and the making of a better and cheaper product—could be maintained without turning economic life into a pitiless struggle for survival. Likewise, the merits of business co-operation, tending toward industrial stability, could be retained without those monopolistic conditions that sometimes impair economic freedom, hold back technological improvement, or exploit the consumer". (Emphasis added.)

(pp. 3-4.)

"It is a matter of good sense that where people have common concerns, they get together to handle them. We know that both labor and management have

a joint interest in increased production. Likewise, both are concerned that employees have good jobs and a constantly improving standard of living. Certainly we can do more to secure these goals by working together than by pulling apart.' (Emphasis added.)

(p. 6.)

This challenge, this opportunity, has been taken up not only by the employers and employees here involved, but by many others. Not only by the creation of the Plumbing and Pipe Fitting Labor-Management Relations Foundation, but by the creation of an Apprenticeship and Training Fund, a Trust (Exhibit A, Ans. p. 14), to implement the provisions of the Shelly-Maloney Act (Apprentice Labor Standards Act), Sections 3070 et seq. Labor Code, State of California.

Not only have farsighted and sincere employers and unions done so of their own accord, but the Federal Government, in the interest of national defense, has fostered and encouraged what the employers and employees have done here.

In "Labor and Management In A Common Enterprise", by Dorothea de Schweinitz, a Wertheim Fellowship Publication, Harvard University Press, we find—

"During World War II the writer, first in the Labor Division of the War Production Board, had the opportunity to read committee minutes and reports and to visit some of the more successful committees in order to develop better techniques as part of her duties as chief of the Committee Standards Branch. *From the beginning of the War Production*

Drive in March 1942 until the close of the war a variety of War Production Board representatives visited war plants to promote committees to assist trouble spots and to observe good techniques. (Emphasis added.)

(pp. 2-3.)

“Labor-Management committees, just as other union-management relations, vary in their degree of development. The growth of cooperation is gradual. A first stage can be designated as ‘information-sharing’ in which an employer looks upon the joint committee as a means of informing employees about business conditions and the outlook for their company, as well as telling them about changes in operating methods before they are put into effect. . . . A further development is seen in ‘problem-sharing’. Here the employer recognizes that workers can make a contribution in certain areas. The company has not been able to solve a problem of high unit costs, poor quality, or waste in materials. In a series of committee meetings management presents the facts and labor is requested to give its opinion on the difficulties described or to make proposals for improving the situation.

“In the third stage of development management indicates a willingness to have labor initiate ideas in any kind of production and personnel activities; and labor, with certain safeguards, is willing to contribute thus to the operation of the business. In this phase of ‘idea-sharing’ management provides information to a greater degree than in the previous stages of ‘information-sharing’ and ‘problem-sharing’. Labor and management are indeed engaged in a common enterprise.

“As among the three types of union-management cooperation, it will not be possible always to differentiate in this volume. Most of the descriptions of labor-management committee operations are based on the experience which, during World War II, came upon unions and companies in various stages of development. Some of the committees described continue to function today.”

(p. 4.)

“During the war some five thousand labor-management committees were organized in factories, mines, and shipyards in the United States.” (Emphasis added.)

(pp. 4-5.)

“An important contribution of the American committees to union-management cooperation in the United States lies in the procedures which were developed. Few theories were expounded. No decrees or laws gave authority to committees. No national employer-union agreements established functions and methods of work. The experiment, however, extended to a larger number of industries and establishments than could have been predicted from prewar experience in union-management cooperation. Production was aided both directly and indirectly through the practical programs developed by employer and union representatives in individual plants. Although tribute was paid to technical suggestions made by workers, *the significant development lay in the joint deliberations of committee members.*

(pp. 5-6.)

“The labor-management production committees, while no panacea for the complex problems of the

total economy, indicates an attitude of reasonableness and exploration. No employer and no union, still in the stage of armed truce, will set up a joint committee of real value." (Emphasis added.)

(p. 15.)

"Cooperation at the plant level, with respect between the parties, may be the route toward the achievement of order and equity without loss of liberty. It provides a training ground for reasoned thinking and just dealing. Consideration of each problem as it affects employer, worker, the union, and the public, the 'orchestration of human interests' within the factory, may become for this country the next development in democratic procedure". (Emphasis added.)

(pp. 18-19.)

In "Labor-Management Co-operation and How To Achieve It" by Leven and Goodell, we find—

"The purpose of the Joint Production Committee is to use every man's facilities—to stimulate, develop, and implement everyone's participation—for the good of the enterprise, and all those engaged in it. It is composed of an equal number of management and workers' representatives." (Emphasis added.)

(p. 7.)

"As President Herman W. Steinkraus, of the Bridgeport Brass Company, says: 'We all know that the last 50 years have shown the brilliant progress of industrial engineering and manufacturing, by which people enjoyed more physical comforts and conveniences at lower and lower prices. I believe in the . . . (coming) . . . years the greatest progress in industry will be

what we may term human engineering, the exploring of the unlimited possibilities of human beings by working together for a common cause, through mutual understanding, respect and teamwork." (Emphasis added.)

(p. 3.)

In "*Human Leadership in Industry The Challenge of Tomorrow*" by Sam A. Lewisohn, President Miami Copper Company-Past President American Management Association, we find—

"Wise experimenters realize that they are not unlike wayfarers stumbling along an unfamiliar path in the dark, they can only feel their way. They are aware that to reach ultimate ends the modifications they attempt in the industrial system must be short steps in the right direction.

"*One such step was the principle of consultation.* It was the basis of employee representation and it has its place today in relationships with trade-unions. Employee representation came from management as a vehicle to assist management leadership. Unionism started essentially as a method of protest by labor. Today in this country it has become mainly a means of collective bargaining, constituting a species of business 'dicker' over terms of employment. The resulting agreement between management and labor should as far as possible be in a form that benefits both parties and society as well." (Emphasis added.)

(p. 2.)

"*Therefore plans for union-management cooperation should be regarded as means which the management officials utilize to assist them in their function of leadership compatible with democratic ideals and*

for tapping the creative resources of the rank and file." (Emphasis added.)

(p. 3.)

"When employers recognize the vital need of developing opportunities for labor to cooperate in production, unions will more widely assume the role predicted for them by their friends. The standards by which the competence of union leaders and the effectiveness of a union itself will be judged will be those relating to general well-being, economic and social. Industrial relations will more and more be directed toward progressive industrial methods and national purposes and less and less to defensive strategy and bargaining. Unions, with their array of leadership and talents, will become a potent force in national productiveness. Hence the resourceful, socially responsible employer regards it as part of his professional duty to develop constructive methods of co-operation with unions. He regards it as a real opportunity in social experimentation." (Emphasis added.)

(p. 5.)

That is the background, those are the forces at work in the field of Industrial Relations.

Those who seek through co-operation to improve the general welfare of industry are arrayed against those who insist that our country and the public must live in an economy in which capital and labor must be forever locked in a cold and hot war.

The employers, the employer association and the local union and the District Council here involved have elected to pursue the path of co-operation and have turned their backs on both the cold and the hot war.

This effort to benefit the Plumbing and Pipe Fitting Industry through the co-operation of employers and employees—fostered and encouraged during the Second World War by the Federal Government—is now claimed by plaintiffs to be illegal on the theory that the independent entity, the Trust, created to provide a vehicle for cooperation is a “representative” of the employers’ employees within the meaning of the Labor-Management Relations Act, 1947.

We submit that plaintiffs are in error and that there is nothing in Section 302 of the Act which prohibits employers and their employees from agreeing to set up and setting up an independent entity for the general welfare of the industry and financing it by employer payments measured by the hours of work performed by employees.

SECTION 302—ITS LEGISLATIVE HISTORY.

Subsection (a) of Section 302 prohibits the payment or delivery or any agreement to pay or deliver money or any other thing of value by an employer to a “representative” of his employees.

Subsection (b) of Section 302 prohibits a “representative” of an employer’s employees from accepting or agreeing to accept or receive any money or other thing of value from such employer.

We put the word “representative” in quotation marks to point up two important facts:

1. It is a word of art, and
2. The prohibition of the statute applies to no other individual or entity.

There is no question but that the word “representative” includes any and every individual and labor organization that acts as the collective bargaining representative of employees in an industry affecting commerce within the meaning of the act.

For some time there was a doubt as to whether the word “representative” included certain officers of a labor organization who participated in the collective bargaining negotiations as the agent of a labor organization which was itself a “representative.” This doubt has been resolved by the United States Supreme Court.

In *U.S. v. Ryan*, 100 L. Ed. (Advance p. 272) (27 LRRM 2582), the Supreme Court said:

“Ryan was president of the International Longshoremen’s Association (ILA) during the years 1950 and 1951. *The ILA and its affiliated groups* were the recognized collective-bargaining agents for longshore labor in the Port of New York and *bargained through a wage scale committee of which Ryan was a member. He signed the agreements negotiated during that period . . .*”

(p. 272.)

“... We do not decide whether any official of the union is ex officio, a representative of employees under Sec. 302. *We believe, however, that respondent’s relationship brings him within that term.*” (Emphasis added.)

(p. 274.)

Thus, an officer of a labor organization which is itself a “representative” *may* be a “representative” depending, it appears, on the extent to which his duties and activities are related to the collective bargaining process.

Thus, we find that the persons and entities within the ambit of the prohibited conduct, "representatives" are:

1. Individuals acting as the collective bargaining representatives of employees.
2. Labor organizations acting as the collective bargaining representatives of employees.
3. Those officers of labor organizations acting as the collective bargaining representatives of employees who participate actively in the collective bargaining process.
4. The issue as to other officers of a labor organization acting as the collective bargaining representative of employees is apparently still an open question.

Thus, unless the person or entity to which payment or delivery of money or other thing of value is made or agreed to be made is a "representative," the payment or agreement to pay is not within the prohibition of Section 302(a) and (b).

The Plumbing and Pipe Fitting Labor-Management Relations Foundation is not a "representative" within the meaning of the Act. It has no connection with the collective bargaining process at all.

The proviso contained in subsection 302(c) which excepts certain payments or agreements to pay a "representative" does not change the fact that the subsections (a) and (b) apply only to a "representative" and not to any other person or entity.

First it excludes from the prohibitions of subsections (a) and (b), (1) "representatives" who are also employees, (2) legitimate payments to "representatives" re-

sulting from legitimate disputes or torts, (3) purchase or sale of commodities to "representatives," (4) payment to a "representative" of dues checked off by employers subject to certain restrictions, and (5) money paid to certain trust funds *established by such "representative"* subject to certain restrictions.

It should be here noted that the trust fund here in issue was not unilaterally established by Local 246.

Subsection (g) provides that if the Health and Welfare or Pension Trust Fund was established by the "representative" prior to January 1, 1946, the restrictions provided in subsection (c) (5) have no application. To trusts established by the "representative" prior to January 1, 1947. *Upholsterers Union v. Leathercraft Co.*, 82 Fed. Supp. 570, 23 LRRM 2315.

Care must be taken not to confuse the exception with the rule.

The rule is that no payments may be made to or accepted by a "representative" except that certain payments may be made to and accepted by a "representative" and certain other payments may be made directly to and accepted by a "representative" if they are made to the "representative" and the "representative" accepts them in trust and that trust contains certain provisions.

Senator Taft summed up the matter when he said:

"The amendment provides first that—

"It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees.

“That is, it may be said, in a case of extortion or a case where the union representative is shaking down the employer. Certain exceptions are made.

“Provision No. (5) at the bottom of page 2 and the top of page 3 of the amendment deals with the question of welfare fund. It provides that the payment must be made, in the first place, as found in line 25 on page 2, ‘to a trust fund established by such representative’—*that is by the union*—‘for the sole and exclusive benefit of the employees of such employer, and their families and dependents, or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents.

In other words, this must be a trust fund. *It cannot be the property of the union without a definite statement that it is in trust for the employees, who after all have earned the money.*” (Emphasis added.)

(Congressional History Labor Management Relations Act, 1947, p. 1311, Col. 2.)

We note first that it is clear beyond question that the Foundation was not created for the purpose of “extortion” nor is it a case where a union representative is “shaking down an employer.”

The manner of its creation (R. 46, 39, 40), clearly and unequivocally negatives such implication as does the stipulation of facts.

“That no demand has been made on plaintiffs, or any of them, or any other employer at any time prior to the date of this stipulation, and none is now made by Pipe Trades District Council No. 36, Local Union No. 246, Paul L. Reeves, or the business manager or

any officer, agent or employees of said District Council or Local Union other than to contract to pay and to pay into said Foundation.” (R. 49.)

We note that the money paid in the instant case is not the property of the Union at any time and it is not the property of any Union officer at any time, it is the property of the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust.

This interpretation seems to meet with the approval of the United States Supreme Court which in *U. S. v. Ryan*, *supra* says:

“Further, a narrow reading of the term ‘representative’ would substantially defeat the congressional purpose. In 1946 Congress was disturbed by the demands of certain unions that the employers contribute to ‘welfare funds’ *which were in the sole control of the union or its officers and could be used as the individual officers saw fit*. The United Mine Workers’ demand that mine operators create a welfare fund for the union by contributing 10 cents for each ton of coal mined, caused the Congress to act. The Case Bill, H. R. 4908, 79th Cong., 2d Sess. which regulated welfare funds in a manner similar to Sec. 302, was enacted in 1946, but was vetoed by the President. The following year the Taft-Hartley Act containing Sec. 302 was passed over another veto. But if ‘representative’ means only the ‘exclusive bargaining representative’ the explicit limitations on welfare funds in Sec. 302 (c) (5) may be easily evaded. Payments made directly to union officials, or to other individuals as trustees would apparently be excluded from Sec. 302. Thus, a narrow construction would frustrate the primary intent of Congress.

“Nor can it be contended that in this legislation Congress was aiming solely at the welfare fund problem. Such a suggestion is supported neither by the legislative history nor the structure of the section. The arrangement of Sec. 302 is such that the only reference to welfare funds is contained in Sec. 302 (c) (5). If Congress intended to deal with that problem alone, it could have done so directly without writing a broad prohibition in Sec. (a) and (b) and five specific exceptions thereto in subsection (3) only the last of which covers welfare funds. *As the statute reads, it appears to be a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative.*” (Emphasis added.)

(pp. 275, 276.)

and we may properly add as a corollary does not outlaw or forbid payments to and acceptance by those persons and entities who or which are not “representatives.”

THE PLUMBING AND PIPE FITTING LABOR-MANAGEMENT RELATIONS TRUST IS NOT A “REPRESENTATIVE” AND ITS TRUSTEES ARE NOT “REPRESENTATIVES”.

There is no question but that the Plumbing and Pipe Fitting Labor-Management Relations Foundation is a trust, a valid subsisting trust.

“Trusts are either expressed or implied, the former being such as are raised or created by the act of the parties. . .”

Walden v. Skinner, 101 U.S. 577, 25 L. Ed. 963.

“It needs no particular form of words to create a trust, so there be reasonable certainty as to the prop-

erty, the objects and the beneficiaries . . . the trust is not perfectly created unless the legal interest be actually vested in the trustee . . . Various instruments may be read together to ascertain the intention to establish one."

Chicago M. & S. P. R. Co. v. Des Moines U. R. Co.,
254 U.S. 196, 208, 41 S.Ct. 81, 65 L. Ed. 219, 227.

"Sections 2221 and 2222 of the Civil Code (State of California) define the method by which a valid trust may be created. If there is (1) an intention on the part of the settlor to create a trust and if (2) the subject of it, the purpose for which it is created, and the beneficiaries are indicated with reasonable certainty, and if (3) the trustees accept the trust, the elements are complete."

Randall v. Bk. of America, 48 C.A. (2d) 249-254;
Quinn v. Central Co., 104 F. (2d) 450-452 (9th Circuit).

It is clear that Plumbing and Pipe Fitting Labor-Management Relations Foundation meets the test outlined by the United States Supreme Court and the decisions and statutes of the State of California.

Now a trust is not an agency, nor is a trustee an agency, nor is a trustor trustee an agent. As said in *Corpus Juris Secundum*:

"The essential distinctions between a trust and an agency are to be found ordinarily in the fact that in a trust the title and control of the property under the trust instrument passes to the trustee who acts in his own name, while the agent represents and acts for his principal, and in the further fact that while a trust may ordinarily be terminated only by the fulfillment

of its purposes an agency may in general be revoked at any time.”

(2 C.J.S. 1034.)

“The powers and duties of a trustee are radically different from those of an agent. The agent’s duty is primarily to his principal for whom he acts and to whom he must account to the cestui que trust, although his authority comes from another. The agent represents and acts for his principal, but a trustee has no principal and cannot render the creator or beneficiary of the trust liable for his contracts.”

(2 C.J.S. 1035.)

The same thought is expressed by the United States Supreme Court as follows:

“A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or an artificial person. A trustee may be defined generally as a person in whom some estate, interest or power is vested for the benefit of another.”

Taylor v. Mayo, 110 U.S. 330-335, 4 S.Ct. 147 28 L. Ed. 163, 165.

That a “representative” within the meaning of Section 302 of the Labor Management Relations Act, 1947, is an agent is, we submit, beyond question.

In speaking of what an agent is *Corpus Juris Secundum* says:

“An agent is one who, by the authority of another, undertakes to transact some business or manage some affairs on account of such other, and to render an account of it. He is a substitute, or deputy, appointed

by his principal primarily to bring about business relations between the latter and third persons.”

(2 C.J.S. 1025.)

The California *Civil Code* Section 2295 defines an agent as follows:

“An agent is one who represents another called principal in dealings with third persons. Such representation is called agency.”

In *U. S. v. Ryan* (supra) the court uses “collective-bargaining agents” and “exclusive bargaining representative” (p. 273) interchangeably and closes with the statement:

“We conclude therefore that Sec. 302 prohibits payments to individuals who represent employees in their relations with the employers.”

(p. 277.)

The “Representative” referred to in Section 302(a) and (b) of the *Labor Management Relations Act, 1947*, is, we submit, an agent, an agent specifically of the employees of the employer paying or delivering or agreeing to paying or delivering or agreeing to pay or deliver, and are not, therefore, within the class of persons or entities against whom the prohibition in the statute is directed.

THE PLUMBING AND PIPE FITTING LABOR-MANAGEMENT RELATIONS FOUNDATION COULD NOT ACT AS A “REPRESENTATIVE OF EMPLOYEES”.

One of the factors which lead to the creation of the Plumbing and Pipe Fitting Labor-Management Relations

Foundation was that there was no effective machinery whereby the provisions of applicable collective bargaining agreements could be policed and enforced.

One of the powers of the Trust specifically enumerated is to enforce the collective bargaining agreements and the provisions thereof.

The collective bargaining agreement Exhibit A attached to the Answer provides:

“Section 17 Joint Conference Board. (A) In those areas in which labor-management set up shall function as a Joint Conference Board with all the powers, rights, duties and obligations hereinafter lodged in the Joint Conference Board.”

One of the powers of the Joint Conference Board and therefore the Trust is to hear disputes and differences which may arise in the enforcement or interpretation of the agreement.

It is axiomatic that an arbiter cannot represent one side or the other.

To say that the employers, the employee associations, the unions, the District Council and the employees agreed to place the “enforcement and interpretation” of the collective bargaining agreement in the sole control of the “representative of the Employees of the employer” is to advance a proposition which is erroneous on its face.

Agreements to arbitrate are specifically enforceable in this state, particularly collective bargaining agreements, *Levy v. Superior Court* (1940) 15 C. 2d 692, 104 P. 2d 770, 129 ALR 956.

The parties were and are well aware of that fact.

Thus when the parties contracted for the settlement of disputes under, and the interpretation of, the collective bargaining agreement by the Plumbing and Pipe Fitting Labor-Management Relations Foundation they did so with the full realization of the fact that the provisions of Title IX of the *Code of Civil Procedure* of the State of California were controlling.

Section 1288 provides for vacating an award procured by corruption, fraud or under means or where there was corruption in the arbitrator or any of them or other misbehavior.

Certainly the parties did not build into the arbitration procedures of their contract an automatic vacation of any award by appointing as the arbitrator one of the "representatives" of one of the parties.

Men are presumed to act reasonably and with due regard for their own person and property and the law.

There is nothing in this record to indicate that the parties intended or desired to perform a useless act when they provided for arbitration by Plumbing and Pipe Fitting Labor-Management Relations Foundation.

However, if it is a "representative" of employees of the employer and not a separate and distinct entity from the employers, employer associations, unions, District Council and employees they have not only performed a useless act but an inherently foolish and unreasonable one.

They would have denied due process to the employer party to the dispute and rendered the arbitration void without recourse to statute.

We respectfully submit that the parties to the collective bargaining agreement and the creators of the trust did not so act and the trust and its trustees are independent entities not "representatives" of the employees.

THE APPLICABLE DECISIONS OF THE COURTS.

The Courts of the State of California have in *Bay Area Painters and Decorators Joint Committee, Inc. (a non-profit corporation) v. Orack* (1951) 102 C.A. (2d) 81, 226 P. 2d 644 expressed the public policy of the State of California with respect to Labor-Management arrangements similar to the one before the Court.

In the *Painters* case the legal entity used as a vehicle for Labor-Management cooperation was a non-profit corporation in the instant case, the entity used is a trust.

The Court says:

"Respondent is a nonprofit corporation, the members of which are representatives of associations of painting and decorating contractors in the San Francisco Bay Area, and representatives of unions of painting and decorating workers in that area. Respondent was organized in order to function as a permanent joint committee under a contract executed by these associations and unions in behalf of their respective members.

"Appellant is a painting contractor in the Bay Area but is not a member of any of the associations. He did, however, become a party to the agreement as a so-called nonmember signatory.

“The contract sets forth the organization and functions of respondent and provides for the establishment of local joint committees and other committees and boards. An equal number of representatives from the employer organization and the employee organization in a given locality make up the membership of a local joint committee. *A local joint committee is authorized to adjust disputes and grievances and is empowered to have access to records pertaining to violations of the agreement with authority to request testimony under oath before a notary public. Funds advanced by the signatories of the agreement are to be used exclusively for such enforcement purposes.* An employer who is not a member of one of the associations may become a party to the agreement either by joining the association or by signing the agreement individually; in the latter case such a party is designated a non-member signatory.

“The joint committee issues shop cards to members of the association and to nonmember signatories upon the payment of a twelve dollar (\$12) flat fee. Since the member of the association pays dues to it for the purpose of financing the contract, the agreement correspondingly obligates the nonmember signatories ‘to deposit on account of his share of the expense of administering the contract an amount equal to the yearly dues paid by the Association.’ The agreement specified the reason for this provision for financing in the following language:

“ ‘Such shop cards are issued for the following reasons: It is agreed that it is unfair for any person to be bound by the terms of this agreement unless other parties thereto observe it likewise. It is recognized that it would constitute unfair competition for one employer to observe reasonable working conditions

agreed upon while his competitors ignored such conditions. *To assure all parties that every party to the agreement complies therewith, it is necessary to use investigators and to maintain a central supervising agency operating as and through the Local Joint Committee. Such supervising involves expense which should as a matter of equity, be prorated on a reasonable basis among all parties who benefit by this agreement and its observance.* It is therefore agreed that the expense of supervising be borne by the Association and/or Chapters and that Shop Cards should be issued as above described to attest that the proportionate share of such expense has been met. As nonmember signatories do not share in the contribution made by the Association, such nonmember signatories shall bear a reasonable prorate on the cost of supervising and shall make a deposit on account of their share of the cost. Such deposit shall be made at the time of the issuance of the cards herein provided and in the amounts herein specified and upon the specified amounts being deposited a yearly renewal card will be issued.' '' (Emphasis added.)

(pp. 82-83.)

“The express purpose of the agreement under which plaintiff was created was to stabilize the painting industry by creating harmonious relations and maintaining stability of conditions of employment, the subject matter of this proceeding, first provides for the organization of the plaintiff committee, then proceeds to set out certain provisions covering apprentices, employers and unions. It then provides for the wages and working conditions of employees, and other terms and consideration as to painting work.

“Provision is made in the agreement for the supervision of the activities of the employers for the pur-

pose of assuring their conformance to the working conditions that had been established.

“ ‘The cost involved in supervising the conduct of the employers is borne by a fund to which members of the association are required to contribute \$12, for which an official shop card is issued, and nonmembers of the association are required to pay \$12 plus certain dues, and for which they receive an identification card. The dues that the nonmembers are required to pay are equal to the dues paid by the members of the associations to their associations. Defendant has contended that the agreement is unenforceable as to him because it is invalid on its face . . . *The Agreement appears clearly to be valid and enforceable.*

“ ‘*It has been long recognized, and it is clearly a desirable situation to achieve, the employers and unions work together for stability in the industry.* As this agreement recites, if an employer enters into an agreement with the union and fails to conform to the working conditions, it would result in unfair competition among other employers, and would also create unrest, labor disturbances, and many other situations that would work to the disadvantage of public welfare. It is therefore proper for association of employers to agree on methods of procedure whereby their activities might be policed and supervised so as to insure observance of the labor agreement entered into between them.

“ ‘Inasmuch as this is true as to the members of the association, it certainly follows that this activity could be extended one step further and a nonmember who adheres to the agreement may well join in such an agreement for the purpose of producing stability in the industry. *It follows as a matter of course that there is a certain cost involved in supervising and*

policing the industry. It is proper for this cost to be borne by a charge placed on the employers. The cases cited by plaintiff in the memorandum filed: *Electrical Contractors Assn. v. Schulman Electric Co.* (1945) 391 Ill. 333 (63 N.E. 2d 392, 161 A.L.R. 787), and also *Griffiths & Sprague Stevedoring Co. v. Waterfront Employers Assn. of Pacific* (1947), 162 F. 2d 1017, clearly set forth why such agreements are not in restraint of trade. Likewise in *Minkoff v. Jaunty Junior, Inc.* (1942) 36 N.Y.S 2d 507, it is recognized that agreements entered into between employers and unions for the bettering of conditions in the industry, even where the employer is called upon to bear a charge involved therein, do not constitute illegal monopolies or restraint of trade. So here the agreement itself cannot be said to constitute a monopoly or restraint of trade. *To the contrary its provisions that would produce harmony and peace in an industrial activity are of the type that ought to be encouraged, and the court should make every effort to see that they are lived up to for the purpose of producing industrial peace that would so benefit the community.'* ” (Emphasis added.)

(pp. 84-86.)

“ ‘There seems to be no reason whatsoever for declaring this agreement invalid. On the other hand, there seems to be ample reason to sustain the agreement. . . .’ ”

(p. 86.)

From the foregoing it is apparent that the public policy of the State of California favors “Union-Management Cooperation” as opposed to an “Armed Truce” or mere Working Harmony.”

We respectfully suggest to this court that such is the basic aim of the *Labor-Management Relations Act, 1947*, and the public policy of the United States.

In its declaration of policy Congress said:

“Sec. 1(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another’s legitimate rights in their relations with each other, and above all, recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.”

In *Rice-Stix Dry Goods Company v. St. Louis Labor Health Institute*, D.C.E.D. Mo. (22 LRRM 2528) (15 L.C. 74290), the Court had before it the question as to whether payments to an incorporated Health Institute was a violation of Section 302 of the *Labor-Management Relations Act, 1947*.

The Court made the following conclusions of law:

“3. That the United Distribution Workers is a labor union within the meaning of the Labor-Management Relations Act of 1947, and said defendant represents for collective bargaining purposes, the employees of the plaintiff in the collective bargaining unit described in contract between plaintiff and the predecessor of defendant, United Distribution Workers, dated December 4, 1947.

“4. That this suit arises under the Labor-Management Relations Act of 1947, and particularly Section 302 of said Act (Section 186, Title 29, U.S.C.A.) and

in the matter of controversy exceeds Three Thousand Dollars (\$3,000.00) exclusive of interest and costs.

“5. That the St. Louis Labor Health Institute is a corporation, independent of the United Distribution Workers, a labor union, representative of a bargaining unit of employees of plaintiff, and the management and funds of the St. Louis Labor Health Institute are not under the control of the United Distribution Workers; nor does the United Distribution Workers have any right, title or interest in and to moneys payed to the St. Louis Labor Health Institute, or in the control or management of the St. Louis Labor Health Institute.

“6. That the St. Louis Labor Health Institute is not a representative of any employees of plaintiff as set forth in Section 302, of the Labor-Management Relations Act, 1947 (Section 187 Title 29, U.S.C.A.)

“7. That none of the moneys paid to the St. Louis Labor Health Institute are paid to any representative of any employees of any employer as set forth in Section 302 of the Labor-Management Act of 1947 (Section 186, Title 29, U.S.C.A.). (*N.B. The Union's head was the Institute's President, its Business Agent Sec.-Treas.*).

“8. That the payment to the St. Louis Labor Health Institute under the collective bargaining agreement between plaintiff and defendant United Distribution Workers formerly known as St. Louis Joint Board, Retail, Wholesale and Department Store Union, E. I. O., dated December 4, 1957, are valid and in no way a violation of the Labor-Management Relations Act of 1947.”

In *United Marine Division I.L.A. v. Essex Transportation Co.*, 216 F. 2d 410 (35 LRRM 2049) the Court says:

“The plaintiff alleges that the defendant company orally agreed to make payments to six trustees of a welfare fund. The defendants say that this oral promise, if it was made, is insufficient to hold them liable for the payments because of a provision in the Labor Management Relations Act of 1947. 28 U.S.C. 141 et seq. (1952). The district court was persuaded that this position was correct and ordered judgment for the defendants without submitting to the trier of the fact the question whether the promise to pay was made as alleged. We are, therefore, confronted at this point with a question of law solely and this question involves the interpretation of Section 186 (c) (5) (B) of the statute referred to.

“The two provisions to which we must give attention are as follows:

‘(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

‘(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.’ 28 U.S.C 186(a) and (b) (1952).

“It is undisputed that at the time of the alleged oral agreement there was a welfare fund set up which was operated by six trustees, three of whom were chosen by the plaintiff union and three by the Marine Towing and Transportation Employers’ Association.”

(p. 411)

“We are faced with the question, therefore, whether an agreement such as the one alleged comes within the prohibition of the language quoted from Section 186.”

(p. 411)

“... Our question becomes whether an agreement to pay money to these six trustees is a promise to pay to ‘any representative of any of his employees.’ ”

(p. 411)

“We think that in this instance the promise of the employer (if indeed the promise was made) was not a promise ‘to any representatives of any of his employees’. *These trustees were not, in our judgment, representatives of the employees.* It is true that they were chosen half and half by the employers’ association and this union. But we think that when set up as a board, as they were in this case, these individuals are not acting as representatives of either union or employers. They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. The terms under which they act were carefully spelled out.

“We think that the promise in this case is outside the evil which the Congress was endeavoring to erase in the sections of the statute which we have quoted. Since the fact situation is outside that evil, we do not think we should enlarge an application of the statute to void the type of arrangement which has met with legislative sanction, judicial approval and is a growing trend in employer-employee relations.”

(pp. 412-413.)

We have not included *U. S. v. Ryan* (supra) since it has been previously referred to at length in this memorandum.

THE BASIC ERROR OF THE COURT BELOW.

The basic error in the position of the court below arises from the fact that the enforcement of the collective bargaining agreement and the protection of wages, rates of pay, hours of labor and other conditions of employment is by the court below erroneously assumed to be solely and exclusively a union function.

The court below completely ignores the fact that the enforcement of the agreement and the maintenance of the negotiated wage structure and conditions as distinguished from the negotiation and bargaining concerning such condition which precede the contract is the immediate and practical concern of the employers individually and as a group.

An employer for example who violated the agreement by the non payment of Health and Welfare, Pension and Apprentice Training could reduce his competitive cost by 21.5¢ per straight and overtime hour per employee or \$1.72 per straight time day per employee.

An employer who did not pay subsistence could reduce his costs \$7.00 per day per employee.

Such an employer therefore could by violating the agreement on a subsistence job reduce his cost \$8.7 per employee per straight time day, or \$43.60 per man per straight time week.

This competitive advantage will directly injure all other employers. On a job requiring ten men the non-complying employer could without any danger to himself bid \$436.00 a week less than the employer who complies with the contract.

Thus it is to the employer's direct and immediate advantage as recognized by the court in *Bay Area Painters and Decorators Joint Committee, Inc. v. Orack* (supra) to have an independent organization set up to enforce the agreements and see that the wages, hours and conditions are maintained.

That the Union per se cannot enforce such rights is clear from *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corporation*, 348 U.S. 37, rehearing denied 349 U.S. 935, because it is a right personal to the employee.

That a union benefits indirectly by an employer signing an agreement, that it benefits indirectly when an agreement is enforced particularly a Union Shop or maintenance of membership clause, that it benefits indirectly every time an employee is paid, that it benefits indirectly every time the employer trains an apprentice and produces a journeyman, that it benefits indirectly every time the employer pays the salary and expenses of his representative sitting on a grievance committee, that it benefits indirectly every time the employer pays one-half the expenses of an arbitration is true.

However we respectfully submit that these are not the benefits the Congress had in mind when it spoke of "other things of value" in a statute aimed at preventing extortion.

CONCLUSION.

While the *Labor-Management Relations Act, 1947*, as amended, is by some felt to be too liberal and by others too restrictive, we know of no one other than plaintiffs who has urged or suggested that its purpose was to turn American industry into an armed camp with Employers and Employees arrayed one against the other suspicious and distrustful of each other with the strike and lockout the rule rather than the exception.

There is nothing in the Act and nothing in its legislative history as a whole which indicates any intention or desire on the part on the Congress of the United States to prohibit co-operation between employers and employees for the general welfare of that industry which provides both with a livelihood, one by way of profits and the other by way of wages.

Rather the purpose of the Act was to recognize the fact that amicable labor-management relations were to be desired and fostered in the interest of the welfare of the general public as well as employees and employers.

To urge that, with such purposes in mind, Congress made it a crime for an employer to finance an independent agency created to foster the general welfare of the industry or train journeymen and apprentices is, we say to pervert the statutory purpose of Congress and the Act.

To attempt to enlarge a statute which makes it criminal for an employer to bribe an employee representative or for an employee representative to extort money or any other thing of value from an employer to include independent juridical entities created to promote co-

operation between employer, employees and the general public for the good of the industry as a whole is, we submit, highly prejudicial to the very purposes for which the statute was enacted.

It is not necessary to dwell on the fact that penal statutes are to be strictly construed and that this is a penal statute (Sec. 302(d)), and that it is for the legislature, and not the courts, to define the crime and extend or contract the area and persons clearly and unequivocally covered by its terms.

We respectfully submit that payment by employers to the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust, does not and to its trustees do not, fit the pattern of conduct prohibited by Section 302(a) or (b) of the *Labor-Management Relations Act, 1947*, as amended.

We respectfully submit that on reason and authority the Plumbing and Pipe Fitting Labor-Management Relations Foundation, a trust, is not now and never has been, and never can be a "representative" of employees, and that the trustees of said Trust are not now, never have been, and never can be, "representatives" of employees, within the meaning of Section 302(a) and (b) of the *Labor-Management Relations Act, 1947*.

Dated, San Francisco, California,

June 12, 1957.

Respectfully submitted,

P. H. McCARTHY, JR.,

Attorney for Appellants.

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No. 1 5 4 4 6 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

FILED

JUN - 2 1958

PAUL P. O'BRIEN, CLERK

PETITION FOR REHEARING

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

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Attorney for Appellant.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC. ,
a corporation, et al,

Respondents.

PETITION FOR REHEARING

Appellants respectfully petition the Court for a
rehearing upon the following grounds:

ARGUMENT

This is the very exceptional case wherein a lawyer's
inclination to advise as to the futility of a petition for rehearing
is overcome by his conviction that a fundamentally wrong
decision has been rendered.

It is not merely the interest of the litigants that makes
it important to obtain a correction of the decision. If allowed
to stand, it will have a demoralizing effect upon the future of

all aviation liability cases brought under federal law in this circuit.

GROUND I.

THE COURT DECIDED AN IMPORTANT QUESTION OF LAW IN A WAY WHICH CONFLICTS WITH ESTABLISHED LAW.

A. Scope and Basis of Decision.

It will be recalled that this was a suit for the wrongful death of three passengers for hire lost in the crash of a DC-6 aircraft July 12, 1953. The plane was operated by Respondent Transocean Air Lines, Inc. (Transocean) on a flight from Guam to Oakland, and crashed about one hour and forty minutes after takeoff from Wake Island and approximately 340 miles east of that point. ^{1/} Only bits of wreckage and fourteen bodies were recovered from the ocean.

In the pre-trial Order herein, respondents stipulated that they "are not aware of any facts which reasonably could have caused this accident, and intend to offer no evidence tending to show such cause." (V. 1, Record (hereafter, R.) 36-37). The Order made on this stipulation was never modified, and to our knowledge respondents have never offered any

^{1/} Inadvertently, this Court stated the time and place of crash as 15 minutes after takeoff and 100 miles east of Wake Island (Opinion, p. 3).

evidence tending to explain the cause of the crash.

Upon these facts, we contended that we were entitled to judgment by application of the doctrine of res ipsa loquitur. We contended that the doctrine, as it applied to common carrier cases, cast upon the carrier the burden of explaining the cause of the accident or of exercising care in all possible respects (Op. Br. 25-29).

Transocean contended that the federal rule of res ipsa was a "watered down" version under which "it cannot be charged with the burden of explaining the cause of the accident or catastrophe" (its Brief, p. 17). It cited Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815; Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 67 S. Ct. , 401, 91 L. Ed. 416; and Johnson v. United States, 333 U. S. 46, 68 S. Ct. 391, 92 L. Ed. 468 as supportive of this view.

In its decision, this court accepted these cases as controlling authorities here, stating that:

"In this case appellant strongly urges (though not exclusively) that the applicability of the doctrine of res ipsa loquitur would cure all the defects seen by the trial court in his case. We cannot agree, for under the doctrine of res ipsa loquitur, as expounded by the Supreme Court of the United States, and applicable in admiralty proceedings, while the doctrine of

res ipsa loquitur permits a verdict for one in appellant's position, its application does not require it. "

We submit that such decision under the facts of this case is incorrect in that none of the foregoing authorities are passenger-carrier cases. The effect of res ipsa in the cited cases is different from the effect of the rule in our case.

B. The True Authorities Are Carrier Cases Which Ever Since Stokes v. Saltonstall 2/ Apply The Rule For Which Appellant Contends.

We did not cite in our Reply Brief Stokes v. Saltonstall and the cases which follow. When Transocean answered our Opening Brief we did not realize that the Supreme Court recognized a different procedural effect of res ipsa in carrier cases than in non-carrier cases, and that since Transocean had cited only non-carrier cases to the Court these authorities did not govern here. We believe that the following will demonstrate that the California carrier cases we cited in our Opening Brief (pp. 26-28) actually stem from law pronounced by the United States Supreme Court in like cases.

In Stokes v. Saltonstall, a passenger sued a stage-coach carrier to recover for an injury sustained when the coach upset. The trial court instructed the jury that: " . . . the facts that

2/ 13 Pet. (U. S.) 181, 10 L. Ed. 115, 7 Am. Neg. Cas. 297.

the carriage was upset, and the plaintiff's wife injured, are prima facie evidence that there was carelessness, or negligence, or want of skill on the part of the driver; and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault"; and also, that it was incumbent on the defendant to prove that the driver was a person of competent skill and good habits, and that he acted on the occasion in question "with reasonable skill, and with the utmost prudence and caution". Judgment for plaintiff was affirmed, the Court stating (193):

"It is objected, however, in the printed argument which has been laid before us, that although the facts of the overturning of the coach, and the injury sustained, are prima facie evidence of negligence, they did not throw upon the defendant the burden of proving that such overturning and injury were not occasioned by the driver's default, but only that the coachman was a person of competent skill in his business; that the coach was properly made, the horses steady, etc. Now, taking that portion of the first and second instructions which relates to the burden of proof together, we understand them as substantially amounting to what the objection itself seems to concede to be a proper ruling,

and what we consider to be the law. For although, in the first, it is said, that these facts threw upon the defendant the burden of proving that the accident was not occasioned by the driver's fault; yet, in the second, it is declared, that it was incumbent on the defendant, in order to meet the plaintiff's prima facie case, to prove that the driver was a person of competent skill, of good habits, and in every respect qualified, and suitably prepared, for the business in which he was engaged; and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution."

In Gleeson v. Virginia Midland R. R. Co., 140 U. S. 435,

35 L. Ed. 458, 11 S. Ct. 859, the court says (p. 443):

"Since the decisions in Stokes v. Saltonstall, 13 Pet. 181, and Railroad Company v. Pollard, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is in passenger cases prima facie evidence of negligence on the part of the carrier, and that, (the passenger being himself in the exercise of due care,) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight.

The rule announced in those cases has received general acceptance; and was followed at the present term in Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551."

Likewise, in Penn. Co. v. Roy, 102 U. S. 451, 455-6, the Court says:

" . . . In Stokes v. Saltonstall (13 Pet. 181), affirming the decision of Mr. Chief Justice Taney on the circuit, we said, that although the carrier does not warrant the safety of the passengers, at all events, yet his undertaking and liability, as to them, go to the extent that he or his agents, where he acts by agents, shall possess competent skill, and, as far as human care and foresight can go, he will transport them safely. The principles there announced were approved in Railroad Company v. Pollard (22 Wall. 341), where, speaking by the present Chief Justice, we said that we saw no necessity for reconsidering Stokes v. Saltonstall.

"These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful,

prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if the carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the

passenger, belong to others." (Or, if we may paraphrase, are maintained by others.)

That the federal rule of res ipsa in carrier cases is not merely a permissible inference was recognized in an annotation, "'Res Ipsa loquitur' as a presumption or a mere permissible inference", 53 A. L. R. 1494, 1509, as follows:

"Even in the United States Supreme Court (although this court is generally credited with having adopted the theory that the doctrine of 'res ipsa loquitur' is a mere permissible inference), the rule is that the happening of an injurious accident, in passenger cases, prima facie, is evidence of negligence on the part of the carrier, and, the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that his whole duty was performed and that the injury was unavoidable by human foresight."

It may readily be seen, then, that the California cases cited (Op. Br. 26-28) by us to this Court do no more than expound the same rule as federal law, which in turn is no more or less than established common law in this respect.

Thus in Fairchild v. Calif. Stage Co., 13 Cal. 599, the court quotes from Story on Bailment (which authority likewise is quoted in Stokes v. Saltonstall) as follows (p. 605):

"In Sec. 605 a, the further proposition is stated, that 'when injury or damage happens to the passengers, by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption prima facie is, that it occurred by the negligence of the coachman; and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof. '"

Stokes v. Saltonstall is cited by the same California court earlier in its opinion.

And in Ficken v. Jones, 28 Cal. 618, 628, the court says:

" . . . If the passenger sustains injury without fault on his part, by the oversetting of a stage-coach, or from a railroad disaster, or the like, such accidents are, in the first place, attributed to the default of the proprietor, and

are prima facie evidence of negligence on his part. (Boyce v. California Stage Co., 25 Cal. 467; McKinney v. Niel, 1 McLean, 540; Stokes v. Saltonstall, 13 Pet. 181; Ware v. Gay, 11 Pick, 106; Ingalls v. Bills, 9 Met. 6; Carpue v. London and Brighton Railway Co., 5 Adol. & E. 747; Ang. on Com. Car., Chap. 11.) In such case it is well settled to be competent for and incumbent on the defendant to show that those in charge of and conducting the business were persons of good and careful habits and competent skill, and also whatever else is necessary to establish the fact of the utmost care and prudence on the defendants' part."

Nothing in Capital Transit Co. v. Jackson, CA-DC, 149

Fed. 2d 839 cited by the court, militates against the foregoing. The only question there was whether res ipsa applies in favor of a passenger against a carrier which injured him in a collision with a truck. The trial court directed a verdict for defendants, and the appellate court reversed, based upon authorities including cases from California. Its discussion of the nature of the doctrine was dictum and did not touch the question in bar. In stating "When all the evidence is in, the question" is still for the jury, Mr. Justice Groner did not define what evidence was required. This we submit has been defined by the Supreme

Court decisions quoted above.

Nor is the inference of negligence for which we contend in the instant case dispelled by the presumption of due care of the deceased pilots. This very point was discussed in The Nitro-Glycerine Case, (Parrot v. Wells, Fargo & Co., 82 U.S. 524, 21 L. Ed. 206) where the court states (p. 537-538):

" . . . A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.

"The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a prima facie case, which the carrier must overcome. His contract is shown, prima facie at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it."

Also, the inference blankets every species of act or

omission which could have caused the crash, not only the conduct of the pilots (Nysted v. Wings, Ltd., 51 Man. Rep. 63, (1942) 3 D. L. R. 336).

C. Transocean's Showing Was Insufficient
 As A Matter of Law.

At the risk of belaboring the fact, we repeat that in our case Transocean did not as a matter of law offer evidence sufficient to meet the requirements of the rule. Not only did Transocean stipulate that it was not aware of any facts which reasonably could have caused the accident, and intended to offer no evidence tending to show such cause (Pre-Trial Order, R. 36-7), it offered none in fact. It did offer evidence tending to rebut, in some respects only, our evidence of specific acts of negligence (our Reply Brief, pp. 6-8). 3/

But most important, Transocean did not and could not offer evidence tending to explain the cause of the accident, nor establish due care in all possible respects which could have caused it. Transocean admitted that it did not know the cause (R. 859). Likewise, it did not know and could offer no evidence that it "acted on the occasion with reasonable skill, and with utmost prudence and caution" (to quote from Stokes v. Saltonstall). There was no evidence of how its pilots acted at and immediately prior to the time of crash. This lack we believe

3/ Although the Court's opinion (p. 2) states: "Defendants offered evidence to show what they knew of the aircraft's maintenance and operation", none of the evidence referred to pertained to the aircraft's operation at and immediately prior to time of crash.

is fatal to the judgment in its favor. It was just such a lack which led Judge Folta, and this court in affirming, to give judgment for plaintiff in Des Marias v. Beckman, 198 Fed. 2d 550

Under these circumstances, we believe that Des Marias v. Beckman, 198 Fed. 2d 550 (CA-9) cited and quoted in extenso by this Court is the closest court of appeals authority for the instant case. There it may be recalled that the plane disappeared without a trace, and the action was for death of a passenger brought against the air carrier under Death On High Seas Act. Defendant offered no explanation of the loss. This Court approved the trial court's opinion which concluded with "I am of the opinion that the doctrine of res ipsa loquitur is applicable. . . Judgment may accordingly be entered for the plaintiffs." No hint appears there that the Court merely drew a permissible inference. Its conclusion appears as the logical result of pure syllogistic reasoning.

That this Court reached a like result was noted (our Reply Brief, p. 5) in Bergen v. U. S. (CA-9) 222 Fed. 2d 949 (1955). There Plaintiff was a passenger of the Alaska Railroad, a Government instrumentality, at the time the car in which he was riding derailed and turned over. The District Court gave judgment for defendant on the ground that there was no showing of negligence. Held, reversed. The Court states (p. 950):

"The cause of the wreck we do not know.

* * * However, we believe that this was clearly

a case of an instrumentality and events solely within

the control of the defendant and a case for the application of res ipsa loquitur. The burden of going forward on negligence was upon defendant, and the plaintiff's abortive attempt to prove the cause of the wreck, we hold, did not remove this burden." (Italics added.)

This case was not cited by this Court and has not been distinguished by it. The Bergen case would appear to state the rule of res ipsa applicable in carrier-passenger cases under federal law, and in accordance with the authorities cited above. We submit that the same rule, and result, should apply in the instant case.

GROUND II.

THE COURT'S HOLDING THAT APPELLANT WAS NOT PREJUDICED EVEN IF THE TRIAL COURT FAILED TO APPLY RES IPSA LOQUITUR SANCTIONS DENIAL TO APPELLANT OF THE MOST VITAL PART OF HIS CASE.

89 C. J. S. 351 states:

"When a case is tried without a jury the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principle of law and he is also the tribunal compelled to determine what the facts are."

In our briefs we pointed to a ruling by the trial court

which denied applicability of res ipsa. That court referred to it three separate times as a "ruling". This Court stated (Opinion, p. 4) that:

" . . . whether or not the court applied the doctrine is not controlling on this appeal. This because, were it applied, the trial court was yet required to weigh all the evidence produced. This the court did and made findings adverse to appellants."

But there could be no finding based upon evidence exonerating Transocean in respect to the manner of its operation of the aircraft after its take-off from Wake Island and immediately before the crash, for no evidence was introduced thereon. This record is silent as to what caused the emergency, or how the pilots acted during and immediately before those last awful minutes.

Yet in reasoning as above, this Court denies Appellant's passengers the benefit of even a permissible inference from res ipsa. For with the trial court's refusal to apply the doctrine (as we believe we have shown), nothing else could supply (1) an inference of negligent conduct by the carrier on the occasion in question, and (2) an inference of proximate cause. Thus, in the final court's view, the scales remained evenly balanced, and we failed to carry our burden of proof. It was to fill just such a gap that the doctrine of res ipsa loquitur

was intended. As approved by this Court (Opinion, p. 6-7) in Des Marias v. Beckman, 198 Fed. 2d 550:

" . . . the function of the doctrine, as stated in the introduction to Shain's *Res Ipsa Loquitur*, is to supply a fact, i. e., defendant's negligence, which must have existed in the casual chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the casual chain, cannot know and cannot prove to have actually existed."

If the function of res ipsa is to supply a fact vital to recovery and which plaintiff cannot otherwise prove existed, the refusal of the trial court to apply the doctrine can hardly be held to be "not controlling" before this Court. In effect, our case never got off the ground without it.

To say (Opinion, p. 4) that with or without res ipsa we do not show a clear preponderance of evidence in this court wholly fails, we submit, to give us the benefit of the rule in the trial court where all we are required to show is a mere preponderance of evidence. Especially is this true where as here the evidence is all circumstantial to the cause of crash.

As to the trial court's refusal to apply the doctrine, we believe the record speaks for itself on this.^{4/} Plaintiff

^{4/} As set forth at length in the Appendix.

requested a ruling on whether or not res ipsa applied. The Court made a ruling, referred to it as a ruling, and all opposing counsel acquiesced in it as a ruling. The Court concluded his statements upon the subject with "I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's ruling." (Italics added.) When appellant's counsel asked whether the subject was "still open for consideration at a later date", the trial judge did say yes, undoubtedly as a concession. At best, this can be construed as no more than saying his ruling was "without prejudice". However, it would have taken a new and different ruling to eliminate the effect of the first one. This record is barren of such.

In our reply brief (p. 4) we cited San Diego Gas & Elec. Co. v. U. S., (CA-9) 173 Fed. 2d 92, 94 (we erroneously cited 174 Fed. 2d 92) where this court stated:

" . . . This judicial comment is in effect a finding that the evidence adduced, taken at its face value, cannot support an inference either of negligence or of a violation of warranty. The last and concluding thought in the comment is" . . . the record shows no basis for liability." This ruling, as would be a formal finding to the same effect, is clearly erroneous."

We believe that a fair appraisal of the language used by the trial court in the instant case leads inevitably to the same

conclusion.

GROUND III.

THE "CLEARLY ERRONEOUS" RULE
(F. R. C. P. 52(a)) DOES NOT APPLY
WHERE THE TRIAL COURT COMMITTED
AN ERROR OF LAW WHICH MANIFESTLY
INFLUENCED OR CONTROLLED HIS
FINDINGS.

In Owen v. Com'l Union Fire Ins. Co. of N. Y., 211 Fed.

2d 488 (CA-4, 1954) the Court states (p. 489):

" . . . The rule that an appellate court
will not disturb findings of fact made by the trial
judge unless they are clearly erroneous does not
apply if he has committed an error of law which has
manifestly influenced or controlled his findings of
fact, such as a mistake as to the burden of proof.
3 Am. Jur. p. 472; Hall v. Hall, 41 S. C. 163, 19
S. E. 305, 44 Am. St. Rep. 696; Chase v.
Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am.
St. Rep. 972."

We submit that the trial court erred in the instant case
in ruling that res ipsa did not apply, and that this error
manifestly influenced and controlled its findings. It follows that
the "clearly erroneous" rule of F. R. C. P. 52(a) should not bind
this Court in its decision here.

GROUND IV.

THE TRIAL COURT SHOULD HAVE
APPLIED RES IPSA AS AGAINST
RESPONDENT SLICK AIRWAYS, INC.
(SLICK).

This Court states (Opinion, p. 12-13) that:

"There seems little question but that on this record we could not hold as a matter of law that Slick had exclusive control over the plane so as to render *res ipsa loquitur* applicable. To consider holding Slick liable would at least require some proof that a failure to maintain the plane in proper mechanical condition was a proximate cause of the crash. This factual issue has been decided by the trial court adversely to appellant."

The factual determination by the trial court would not be binding where it ruled that res ipsa did not apply against Slick, if that ruling was erroneous. We believe it was, because the theory of retained control by a maintenance firm permits the doctrine to apply as against it. Our authorities to this effect were cited (Op. Br. 20-21), and not distinguished.

Additionally, Prosser on Torts (2 ed. 1955) states (p. 206):

"There are other cases in which it is clear

that 'control' is simply the wrong word. The plaintiff who is riding a horse is in exclusive control of it, but when the saddle slips off the inference is still that it is the fault of the defendant who put it on." (Citing Rafter v. Du Brock's Riding Academy, 75 Cal. App. 2d 621, 171 P. 2d 459).

Nor does res ipsa against Slick preclude res ipsa against Transocean, since a carrier's duty to maintain its equipment is historically held to be non-delegable and in the case of our carrier expressly imposed by law (Op. Br. pp. 15-16).

Also, the statement (Opinion, p. 13) that to consider holding Slick liable required some proof that maintenance failure "was a proximate cause of the crash" we earnestly believe to be wrong. All we are required to show is some proof of each of the elements which give rise to res ipsa. This we did by uncontradicted proof showing the carrier-passenger relationship, the crash, and that Slick did the maintenance on the aircraft under a contract to keep it airworthy. The doctrine is then before the trial court for its consideration. We need not inquire as to its procedural effect as against Slick. For if it is in the case at all, the trier of fact at least can draw a permissible inference from it of negligence and proximate cause. Here, he ruled it was not in the case. Again, without

res ipsa in the trial court our case never got off the ground.

CONCLUSION

There is neither novelty nor uncertainty in the authorities which govern the rights of a passenger as against his carrier - whether it be a stagecoach or an airplane. As against Transocean at least we feel firmly convinced that we were entitled to res ipsa and didn't get it in the trial court.

Surely, this is a case where a rehearing should be granted to keep consistency in the law and do justice among the parties.

Respectfully,

A. J. BLACKMAN

Attorney for Appellants.

CERTIFICATE OF COUNSEL

A. J. Blackman, counsel for the above named appellants and petitioners, certifies that in his judgment the petition for rehearing which accompanies this certificate is well-founded, and that it is not interposed for delay.

Dated this May , 1958.

A. J. BLACKMAN





APPENDIX

The proceedings at trial, ending with the Court's ruling that the doctrine of res ipsa did not apply, have been extracted from the Record, as follows:

(Friday, April 13, 1956)

"MR. BLACKMAN: . . . So I would respectfully ask the Court, if it would, to see whether or not it will give us an answer to those questions of law that are contained in the pre-trial order, at least, so that we know just how far our proof should extend at this time.

"THE COURT: Well, I just had in mind your proceeding at this time, Mr. Blackman - in other words, calling your witnesses. We will take care of that as we go along, and not make any decision on that right now.

"MR. BLACKMAN: I see.

"THE COURT: I will work on it some on the week end or sometime, but I have been trying this case and I thought maybe we could go ahead and I could work on it during the week end.

"MR. BLACKMAN: Fine, your Honor.

"MR. TILSON: I can assure your Honor that we have no idea of conceding that res ipsa applies in this particular case, which, of course, is on the admiralty side and brought under a specific statute which was not in any manner involved

in the cases cited. So that I think before we get through we will be going ahead with all of it anyway.

"THE COURT: We'll just proceed with the case.

"THE TILSON: Yes, just go ahead with the trial.

"THE COURT: Well, we'll do it that way. The

Court has made its statement. Mr. Tilson spoke, and I take it Mr. Kearney and the rest of you go along with Mr. Tilson's statement on that?

"MR. KEARNEY: Yes, your Honor, although I think, as far as Douglas Aircraft Company is concerned, the plaintiff does not claim that the doctrine of *res ipsa loquitur* would in any event apply.

Isn't that true, Mr. Blackman?

"MR. BLACKMAN: I think that's a fair statement, yes.

"MR. FOXX: On behalf of defendant Slick, we certainly strenuously contend that it does not apply to the defendant Slick.

"THE COURT: All right. Well, you might as well proceed then. "

* * * * *

(Tuesday, April 17, 1956)

"MR. BLACKMAN: One other matter, if I may inquire of the Court whether or not the Court has come to any conclusion concerning this question of the applicability of *res ipsa loquitur*.

"THE COURT: Well, I felt that it didn't apply. Just

go ahead with your case.

"MR. BLACKMAN: I see. Is that an indication that the Court has on the basis of the evidence that has been submitted so far?

"THE COURT: Oh, no. I had to make a ruling the other day when you brought that question up.

"MR. BLACKMAN: Yes.

"THE COURT: I said that if I ruled on that it would shorten the case, and I said I felt it didn't apply. So we will proceed with the trial.

"MR. BLACKMAN: Is the question still open for further consideration at a later date?

"THE COURT: Yes, certainly.

"MR. BLACKMAN: I see.

"THE COURT: I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's ruling.

"MR. TILSON: No, indeed.

"MR. WEST: No quarrel, your Honor.

"MR. FOXX: No quarrel.

"THE COURT: All right."

No. 1 5 4 4 6 (In Admiralty)

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Appellants,

vs.

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a corporation, et al,

Respondents.

APPELLANTS' OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

FILED

JUL 22 1957

PAUL P. O'BRIEN, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a
corporation, et al,

Respondents.

APPELLANTS' OPENING BRIEF

JURISDICTIONAL STATEMENT

This is an action for damages for the wrongful death of three fare-paying passengers killed in the crash of a DC-6 aircraft, N 90806. Respondent Transocean Air Lines, Inc. (hereinafter sometimes called "Transocean") owned and operated the aircraft. Respondent Slick Airways, Inc. (hereinafter sometimes called "Slick") maintained it, and Douglas

Aircraft Company, Inc. (hereinafter sometimes called "Douglas") manufactured it.

The crash occurred in the Pacific Ocean approximately 340 miles east of Wake Island. The District Court had jurisdiction under the provisions of the Death on the High Seas Act, 46 U.S.C. 761-767. As against Transocean, the pleadings so allege (V. 1, R. 2, 5 and 10). ^{1/} As against Slick (sued as Doe Four), jurisdiction originally was asserted upon the basis of diversity of citizenship (28 U.S.C. 1332) (V. 1, R. 4, 7, 11). Although filed on the law side, the action was transferred to the admiralty side of the docket by orders of the court dated December 16, 1954 and January 10, 1955 (Supplemental R. 11, 16). Thereafter the matter was tried in admiralty, without a jury, before the Honorable Thurmond Clarke.

Both in pre-trial proceedings and at the outset of trial, plaintiffs contended that the doctrine of res ipsa loquitur was applicable as against the air carrier and maintenance company (V. 1, R. 37; R. 4, 35). After the trial court indicated its belief that res ipsa loquitur did not apply in admiralty (R. 90),

^{1/} References to the Record are designated "R. ____". The Record herein comprises 5 volumes. Volume 1 contains the Clerk's transcript, and Volumes 2 to 5 contain the Reporter's transcript of trial proceedings. Since both Volumes 1 and 2 commence numbering with Page 1, references to pages in Volume 1 will expressly indicate that volume by "V. 1".

plaintiffs put in evidence specific acts tending to show negligence. On their part, defendants offered no evidence to explain the cause of the crash. Nevertheless, the Court gave judgment for defendants (V. 1, R. 51), from which plaintiffs filed notice of appeal. While Douglas is a respondent herein, it has been joined only so that the Court can have all parties before it (V. 1, R. 57).

Jurisdiction of this Court is conferred by 28 U. S. C. 1291 and 2107.

STATEMENT OF THE CASE

On July 12, 1953, at 0004 ^{2/} DC-6 Aircraft N 90806 departed Guam eastbound for Oakland as Flight 512, carrying 49 passengers and a crew of 8 (R. 53). Intended en route stops were Wake Island and Honolulu (R. 53). The flight landed at Wake at 0539, refueled, and departed at 0658. 50 passengers were then aboard, including Maria G. Muna, Francisco G. Muna, and Catalina Manalisay Guterrez (R. 54). The persons named were passengers for hire who had boarded the aircraft

^{2/} Unless otherwise stated, all times are stated in terms of Greenwich Civil Time and on the 24 hour clock. This is for the reason that the geographical places involved are located in different time zones. Conversions from Greenwich Civil Time to local standard time may be made as follows: Oakland, minus 8 hours; Honolulu, minus 10; Wake Island, plus 12; Guam, plus 10.

at Guam (R. 54).

At 0729 Flight 512 radioed a 100 mile east position report, notifying that it had reached its assigned cruising altitude of 15,000 feet two minutes earlier (R. 57). At 0828 the aircraft radioed that it was cruising at 15,000 feet between cloud layers (R. 58). The message included no report of any turbulence or weather phenomena, and no indication of any difficulties (R. 58). This was the last radio contact with the flight (R. 58).

Approximately 12 minutes thereafter, N 90806 crashed into the Pacific Ocean, killing all 58 occupants (R. 59). A search for the aircraft resulted in recovery of some wreckage and floating bodies.

Douglas manufactured N 90806 in 1949 as its first DC-6 model (R. 42). In April, 1951, it sold the aircraft to Slick (R. 42-43). Slick operated it as a cargo-type aircraft until about June 26, 1952, when it installed a passenger interior and sold the plane to Transocean (R. 43-44).

Transocean operated N 90806 at all times thereafter in flights between all or some of the following points: Burbank, Oakland, Honolulu, Wake Island, Guam, and Tokyo (R. 44). In such operations, Transocean acted as a common carrier (R. 44) under its authority from the Civil Aeronautics Board as a large irregular (nonscheduled) air carrier (R. 356-7).

During this period Slick performed maintenance from time to time on N 90806, at Burbank, under a written contract with Transocean. By this contract, Slick undertook to maintain the airplane in airworthy condition, for which Transocean agreed to pay Slick \$101.00 to \$115.00 per hour of aircraft operation, this being in excess of \$23,000 per month (R. 45, P's Ex. 6).

Appellant is the administrator of the estates of Maria G. Muna, her son, Francisco G. Muna, and Catalina Manalisay Guterrez (R. 345). Maria G. Muna was 51 years of age (R. 615) $\frac{3}{4}$, and left surviving her four daughters, a son Jesus, age 15 (R. 576), and her mother, Maria Tiron Gutierrez, age about 78 (R. 468). Two of the daughters, Flora Santos, age 27 (R. 444), and Geneveva Adawag, age 24 (R. 507), are married; Dorothy, age 17 (R. 577), and Mariguita, age 12 (R. 576), are unmarried.

Catalina Manalisay Guterrez was 23 years of age (R. 380), unmarried (R. 386), and left as her heirs at law her father, Jesus T. Gutierrez, age 47 (R. 378), and mother, Maria M. Gutierrez, age 44 (R. 378); two adult brothers, Domingo, age 25, and Felipe, age 21 (R. 380), and two sisters, Ignacia, age 24 and unmarried (R. 383), and Lourdes, age 7 (R. 379). Jesus T. Gutierrez and Maria G. Muna were brother and sister (R. 422).

3/ All ages stated are as of July 12, 1953, the date of crash.

Francisco G. Muna was age 9 (R. 444), and left as his heirs his brother and sisters in the Muna family above. The members of both families are American natives of Guam (R. 607). This action is for the benefit of the foregoing heirs at law.

QUESTIONS PRESENTED

I.

The basic issue involved in this appeal is whether the doctrine of res ipsa loquitur applies against an air carrier and maintenance firm, or either, sued in admiralty for the death of a passenger in an airplane crash on the high seas. The District Court apparently decided this issue in the negative. Since Respondents offered no evidence tending to show the cause of the crash, the judgment in their favor is explainable on no other basis. Appellants contend that the issue should be resolved in the affirmative.

II.

Alternatively, this appeal presents the question of whether Appellants are entitled to judgment by reason of the clear preponderance of evidence. The trial court answered "No". Under the rule of trial de novo in Admiralty appeals, we believe this evidence should be reweighed by the Circuit Court, and the question answered "Yes".

SPECIFICATION OF ERRORS

1. The District Court erred in failing to give plaintiffs the benefit of the doctrine of res ipsa loquitur.
2. If the District Court did give plaintiffs the benefit of the doctrine, it erred in failing to give judgment for plaintiffs.
3. Irrespective of res ipsa loquitur, the District Court erred in failing to give plaintiffs judgment by reason of the clear preponderance of evidence.
4. The District Court erred in making certain findings of fact which are not supported by evidence.
5. The District Court erred in failing to make findings of fact and conclusions of law in respect to issues of whether or not plaintiffs were entitled to recover for loss of baggage and amounts paid for tickets.

SUMMARY OF ARGUMENT

In The Silverpalm, (C. A. 9), 79 F. 2d 538, This Court stated that in a case of novel impression based upon newly created statutory rights in admiralty, the long established administrative practice of writing an opinion is recommended to the District Court. We concede that this case is such. Yet

because no opinion accompanied the judgment below, it is necessary in our discussion here to assume, first, that we did not receive the benefit of the doctrine of res ipsa loquitur, and second, if we did receive it we should have recovered judgment. We did request the trial judge to include in the record a statement of decision as to whether or not it applied the doctrine in arriving at its judgment (R. 53). The request was denied (R. 56), although at one stage during the trial proceedings the Court stated that the doctrine did not apply (R. 90).

Accordingly, Point I of our argument demonstrates that the doctrine is applicable as against Transocean as an air carrier, and Slick as a maintenance company performing the non-delegable duty of maintaining N 90806 for the air carrier. We then show by cases construing related Acts that res ipsa loquitur is authorized under the Death on the High Seas Act.

Point II illustrates that with res ipsa, appellants are entitled to judgment. This is so primarily because respondents introduced no evidence of any kind to explain the crash or to show due care in all respects which could have caused it. In fact, respondents stipulated that they "are not aware of any facts which reasonably could have caused this accident, and intend to offer no evidence tending to show such cause." (R. 36-37). Secondly, we show that the inference raised by res

ipsa is not dispelled by the presumption of due care, if any, on the part of the deceased pilots, because the inference blankets every kind of act or omission which could have caused the crash, not only the conduct of the pilots. We point to Des Marias v. Beckman, (C. A. 9) 198 F.2d 550, and Haasman v. Pacific Alaska Air Express, 100 F. Supp. 1, as squarely in point. Also, we show that the inference is not dispelled by our introducing specific acts of negligence under the authority of Leet v. Union Pacific R. R. Co., 25 Cal.2d 605, cert. denied, 325 U. S. 866.

In Point III, we call attention to some of these specific acts of negligence. We do this under the rule in admiralty appeals which gives this court the power to reweigh the evidence as in a trial de novo. As against Transocean, we point out faulty maintenance of the auto pilot, an instrument system which is highly critical to flight control and is usually engaged at cruising altitudes in long over-water flights. We point to inadequate pilot training, including the failure of both pilot and co-pilot on N 90806 to take important and required training in emergency procedures. Next, we point to scheduling pilots for duty an excessive number of hours, thereby inducing fatigue. In this specification we show that the flight crew of N 90806 had been on duty approximately 28 hours out of the last 42, and according to the expert opinion of a specialist in the physiology of aviation medicine, the pilots

were in a state of fatigue at the time of the crash. In the opinion of the same expert, they had inadequate rest on the ground at Guam (less than 14 hours after a flight of over 14 hours from Honolulu), and inadequate rest facilities aboard the airplane (1 crew bunk for 7 male flight crew members). We then show by the testimony of Transocean's own vice-president in charge of operations that it would have been good practice for the air carrier to change crews at Wake Island, although this was not done here. Two other pilot expert witnesses corroborated the value of such a crew change. Finally, we show that prior to the last take-off from Wake Island the captain failed to complete and leave on the ground a written pre-flight check list as required by Civil Air Regulations and the carrier's own manual. The crash followed shortly thereafter.

As against Slick, specific acts of negligence include, first, records of omitted test flights. As a result of these, discrepancies or "squawks" were corrected by personnel at other stations, or not at all. We next show where important aircraft components have operating limitations in terms of so many hours of permitted operation. It is both sound practice and required by Civil Air Regulations (hereinafter called "C. A. R.") to abide by these limitations, yet in at least one instance involving a vital auto pilot amplifier, Slick failed to

do so. A malfunction of the gyro in this unit would cause a violent reaction to the aircraft. Finally, we show other instances where Slick omitted maintenance, or did it in such a manner as to fail to eliminate the flight squawks which gave rise to the work.

In Point IV we call attention to certain findings made by the trial court which are unsupported by the evidence. In Point V we show where we were entitled to recover in any event for the value of our decedents' lost baggage and fares paid for transportation never received. Evidence of these items was introduced, and as to baggage the carrier is a virtual insurer. Nevertheless, the trial court made no findings to dispose of these items.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN FAILING
TO GIVE APPELLANTS THE BENEFIT OF
RES IPSA LOQUITUR.

A. As Against Transocean.

1. Operational Fault. Generally, the courts have applied the rule of res ipsa loquitur in favor of passengers of air carriers. As early as 1932 the California court adopted

the rule in Smith v. O'Donnell, 215 Cal. 714, stating (p. 720):

" . . . It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier. To indulge for a moment in the speculation which follows in the wake of the statement just made, if there are those in the business of carrying passengers in the air to-day (and we do not say there are) who are sufficiently unmindful of their humanitarian duty as to neglect to employ the utmost care in the selection and operation of their craft, the industry and the public both will benefit by the application of a rule of liability which will either require such care or ultimately eliminate them from this field of service."

The rule in England is the same. In Fosbroke-Hobbes v. Airwork, Ltd., 1 All. E. R. 108 (1937); 1 Avi. 663, 664, the following appears:

"It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails

and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches: Carpue v. London & Brighton Ry. Co. (1)."

Likewise in Canada, where the court in Malone v. Trans Canada Airlines (1942) Ont. R. 453, 3 DLR 369, states:

"With experienced and careful pilots and proper equipment, a passenger has the right to expect that he will be carried safely to his destination."

Whether on land or sea, crashes are not ordinary perils of air travel. As stated in U. S. v. Kesinger, 190 F.2d 529 (Cir. 10), 3 Avi. 17, 609, 10:

". . . An airplane of a proven safe type of design taking off for an ordinary routine flight under normal weather conditions does not crash in the ordinary course of things, unless there has

been a failure to properly inspect, service and maintain it, or unless it is not operated with due care."

This is all the more true where, as here, the record shows without contradiction that:

(1) There was no evidence of sabotage (R. 359, 60);

(2) Weather was not a factor (good weather forecasted - R. 55; radio reports received after Wake departure made no reference to turbulence or other weather phenomena, and described flight cruising "between cloud layers" - R. 58).

(3) A Pan American Airways aircraft flying at 7,000 feet followed N 90806 through the same airway without difficulty or unusual weather (R. 75, P's Ex. 4).

Nor does inability to show the specific cause of the crash preclude application of res ipsa. Recognizing this, the doctrine was applied in 1951 to the unexplained disappearance of a commercial airliner while on a flight from Yakutat, Alaska to Seattle (Beckman v. Des Marias, Haasman v. Pacific Alaska Air Express, Inc., Manders v. Pacific Alaska Air Express, Inc., 100 F. Supp. 1, affirmed in 198 F.2d 550 (C.A. 9), cert. denied. (1953) 344 U.S. 922). There, as in the instant

case, the action was by personal representatives, suing for the death of their decedents, passengers on the plane. We believe that these cases are persuasive authority before this Court.

2. Maintenance Fault. Transocean's duty extends not only to proper operation of the airplane, but also to its proper maintenance. The fact that all the major maintenance was done by Slick (R. 255) does not relieve Transocean of the responsibility therefor. Maintenance of an aircraft is always the primary responsibility of the air carrier, irrespective of who actually does it.

C. A. R. §42.30 provides:

"No person shall operate an aircraft which is not in an airworthy condition. . . . "

10 Am Jur. 104 states:

"The duty of a common carrier of passengers to exercise the requisite degree of care for those it undertakes to transport upon its facilities is non-delegable, so that a passenger who sustains injuries because of the fact that such degree of care was not exercised is entitled to hold the carrier responsible, notwithstanding the accident is directly attributable to the negligence of an independent contractor. "

DeVito v. United Airlines, Inc., 98 Fed. Supp. 88 (D. C. N. Y.) involved the crash of a DC-6 at Mt. Carmel, Pennsylvania. There, Douglas failed to inform United that carbon dioxide discharged in the baggage compartment could enter the cockpit and overcome the pilots. After discussing Douglas's negligence, the court states:

"As to the defendant, United, the question of its liability to the plaintiff must be considered in the light of the duty it owed to its passengers to use the highest care in the maintenance and the operation of its airplanes . . . United contends that it relied upon Douglas and that failure to prevent hazardous carbon dioxide concentrations from entering the cockpit was negligence on the part of Douglas. Insofar as concerns its duty to its passengers, however, United's reliance upon Douglas would not lessen the duty owed."

Likewise in the instant case the fact that Transocean relied, if at all, upon Slick's performance of its contractual obligations to maintain N 90806 in airworthy condition in no way lessened Transocean's duty of care to its passengers.

B. As Against Respondent Slick.

For maintenance purposes, N 90806 was flown to Slick's shops at Burbank (Flight logs, D's Ex. G, H). One of

Transocean's department heads (R. 208) testified that "Slick did all the major maintenance" on the airplane (R. 255).

Although the record shows that some maintenance work was performed by Transocean in Oakland (e. g. , R. 51, 217, 239), it does not appear that this in any way changed the obligations Slick assumed under its contract. Those obligations imposed a duty of care not only in favor of Transocean, but also passengers on N 90806 for whose benefit safetywise performance was intended (Dahms v. General Elevator Co. , 214 Cal. 733; Cowles v. Independent Elevator Co. , 22 Cal. App. 2d 109; Restatement, Torts , §404, page 1092).

By the contract Slick agreed to maintain N 90806 in air-worthy condition (R. 45). In Webster's New International Dictionary (1939) "airworthy" is defined as follows: "Fit for operation in the air; able to bear the strains of flight, to withstand storms, etc., as an airplane." By the same contract Slick agreed that "All services . . . shall be done in a good and workmanlike manner and shall comply with requirements of C.A.A." (P's Ex. 6). C.A.R. , §18. (14 C.F.R.) defines maintenance as follows:

"Maintenance, which includes preventive maintenance, is the inspection, overhaul, repair, upkeep and preservation of airframes, powerplants, propellers, and appliances, including the replacement of parts."

§ 18.30 provides:

"All maintenance and repair shall be accomplished in such a manner and the materials used shall be of such quality and strength that the condition of the part of the aircraft on which such work has been performed shall, with regard to aerodynamic and mechanical function, structural strength, resistance to vibration and deterioration, and other qualities affecting airworthiness, be at least equivalent to its original or properly altered condition."

In the instant case, the parties stipulated that the Douglas DC-6A aircraft was designed, engineered and manufactured as a fail-safe airplane, and that it is in current use by many of the larger scheduled airlines throughout the world with generally satisfactory operating results (R. 177). It follows that had Slick properly performed its maintenance duties on N 90806, the airplane would have been "at least equivalent to its original or properly altered condition", i. e., a fail-safe airplane.

But the fact appears otherwise. Michael Gerundo, M. D., Medical Examiner of Guam, performed autopsies upon the bodies recovered from the crash (R. 183), some 14 in number (R. 185). He was an experienced pathologist (R. 181). His

conclusions, based upon medical evidence, furnish the only known reliable indication of some of the factors that did or did not exist aboard N 90806 at the time of the accident. Some of these were that:

(a) There was no fire or explosive action (bodies were not burned - R. 184);

(b) There was no unusual weather (R. 187) (seat belt lacerations absent from all except three victims - R. 186-6);

(c) The airplane nose-dived almost perpendicularly into the ocean (fractures found could be referable only to such an attitude - R. 189).

We doubt that respondents seriously can contend that N 90806 in its "original or properly altered (maintained) condition" would suddenly nose-dive or otherwise crash into the sea, barring fault. Such a catastrophe speaks for itself that improper maintenance or improper operation, or both, caused it.

In Zentz v. Coca Cola, etc., 39 Cal. 2d 436, 446, the Court states:

"(A)s a general rule, *res ipsa loquitur* applies where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone

and the defendant is probably the person who is responsible. "

In the instant case it is clear that the balance of probabilities point to negligent maintenance as at least one cause of the accident. In Johnson v. U. S., 333 U. S. 46, the Court states:

"No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events. "

Applying the doctrine as against Transocean in no way precludes its application as against Slick. Two parties having control can properly be called upon to give an explanation of their conduct (Ybarra v. Spangard, 25 Cal. 2d 486; Stanford v. Richmond Chase Co., 43 Cal. 2d 287). Moreover, the fact that the accident occurred some time after Slick relinquished control to Transocean does not debar the doctrine. If the condition of the instrumentality was not otherwise changed in the meanwhile, responsibility remains (Zentz v. Coca Cola, etc., 39 Cal. 2d 436).

The theory of retained control was applied to an elevator maintenance company which had exclusive charge of repair and inspection in Dahms v. General Elevator Co., 214 Cal. 733.

In Hercules Powder Co. v. Automatic Sprinkler Corp., 151 A. C. A. 417 (1957), Automatic installed a sprinkler system

in plaintiff's building and inspected it about every six months, although it had no contract for maintenance. Hercules also did some work on the system. A fire ensued in which the building was damaged. Some of Hercules' employees were injured. They joined as plaintiffs. The trial court refused res ipsa and judgment was for defendant Automatic. Held, reversed on that ground as against all plaintiffs. The Court states (page 425) that the employee plaintiffs "properly rely on Hardin v. San Jose City Lines, Inc., 41 Cal. 2d 432 (260 P. 2d 63); Stanford v. Richmond Chase Co., 43 Cal. 2d 287 (272 P. 2d 764); Raber v. Tumin, 36 Cal. 2d 654 (226 P. 2d 574); Summers v. Tice, 33 Cal. 2d 80 (199 P. 2d 1, 5 A. L. R. 2d 91), to argue that as to them the instrumentality which caused the accident was in the control of, either Hercules or Automatic or both, and the accident could have been caused by the negligence of either or both, and that the facts that respondents blame Hercules for the accident does not preclude the application of res ipsa loquitur to the individual appellants, as they are entitled to their own theory of causation and can recover."

We submit that the instant case against Slick is even stronger, where its duty was defined by a written contract, and its contact with the airplane was much more frequent. Moreover, Slick was under an affirmative duty to inspect (C. A. R., § 18.30). In Zentz v. Coca Cola, etc., 39 Cal. 2d 436, 449, the Court says that "if defects develop in used bottles

which are not discoverable upon visual inspection, there is a duty upon the bottler of carbonated beverages to make appropriate tests before they are refilled, and that if such tests are not commercially practicable the bottles should not be re-used. The only suggested possible cause of the defective condition of the bottle which might not be attributable to defendant's negligence is that the bottle may have been a new one and may have contained latent defects which the bottler had no practicable means of discovering. (See Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 460 (150 P. 2d 436); Honea v. City Dairy, Inc., 22 Cal. 2d 614, 618-621 (140 P. 2d 369).) It is our opinion, however, that the existence of this possibility is insufficient to prevent application of the doctrine of *res ipsa loquitur*."

The degree of care and inspection required of a bottler certainly should be no greater than that required of a firm which has assumed a contractual obligation to maintain a DC-6 airplane used in common carriage of passengers. We submit that the doctrine of res ipsa should be applied as against the maintenance company, Slick.

C. Under Death on the High Seas Act (D. H. S. A.).

The Death on the High Seas Act, 46 U. S. C. A. 761-767, was adopted March 30, 1920, and provides in part (§ 761) as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default occurring on the high seas . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty . . . "

It is true that this Act created a right where none existed before (Batkiewicz v. Seas Shipping Co., 54 Fed. Supp. 789). However, it is subject to construction by principles of admiralty law (The Friendship II, 113 Fed. 2d 105), including those principles which relate to maritime torts in general.

The doctrine of res ipsa loquitur is not new or novel in admiralty. It has been applied to cases arising under the Jones Act (46 U. S. C. A., §688) both in situations where negligence caused injury to a seaman (Jones v. Reading Co., 45 Fed. Supp. 566, D. C. E. D. Pa.; Lejuene v. Gen. Pet. Corp., 128 Cal. App. 404; Carlson v. Wheeler-Hallock Co., 137 P. 2d 1001 (Ore.)) and in situations where death ensued (The Columbia, 25 Fed. 2d 516, D. C. S. D. N. Y.). Its application in such a case, in admiralty, has had the express approval of the Supreme Court in Johnson v. U. S., 333 U. S. 46, where it states (page 49):

"The Jones Act makes applicable to these suits the standard of liability of the Federal Employers' Liability Act, 35 Stat. 65, as amended, 53 Stat. 1404, 45 U. S. C. §51."

The Act last cited affords a remedy for injury or death of railroad workers "resulting in whole or in part from the negligence" of the railroad.

In Pitcairn v. Perry, 122 Fed. 2d 881 (C. A. 8), the Court states:

"The contention made by defendants that the doctrine cannot be invoked in an action based upon the Federal Employers' Liability Act is determined by this court adversely to their contention in Terminal Railroad Association v. Staengel, supra, (122 F. 2d 271, 273, C. A. 8) where it is said: 'Tested by the above considerations on the fact situation above outlined, this is a res ipsa loquitur case. This is directly ruled by Southern Ry. (Carolina Division) v. Bennett, 233 U. S. 80, 34 S. Ct. 566, 58 L. Ed. 860'"

If both Federal Employers' Liability Act and Death on the High Seas Act speak of negligence and res ipsa applies in the former, there is no sound reason why it should not apply in the latter Act.

The Jones Act applies only to seamen. In the Death on the High Seas Act, "Congress was also affording a remedy for an additional class of beneficiaries." (The Four Sisters, 75 Fed. Supp. 339, D. C. D. Mass.) There appears no reason to

impute to Congress the unjust intent to grant res ipsa to seamen and at the same time to deny it to passengers. The fact that Death on the High Seas Act affords a cause of action for one's "wrongful act, neglect or default" would appear to broaden, not narrow, the protection intended to be afforded to passengers. Indeed, the language is consistent with the broad liability imposed upon carriers for default of their contractual obligation of carriage irrespective of negligence.

II.

IF THE DISTRICT COURT DID APPLY RES
IPSA LOQUITUR, IT ERRED IN FAILING TO
GIVE JUDGMENT FOR APPELLANTS.

A. No Affirmative Showing to Rebut Inference.

The pre-trial Order in this case (V. 1, R. 36-37)
recites:

"It has been stipulated in conference that
defendants are not aware of any facts which
reasonably could have caused this accident, and
intend to offer no evidence tending to show such
cause."

At trial, this stipulation was referred to in Appellants'
opening statement (R. 4). It was never modified, and to our
knowledge Respondents have never offered any evidence tending

to show the cause of crash of N 90806.

In his final argument, counsel for Transocean admitted that they "do not know what happened" (R. 859). He did hint that flying saucers may have caused the crash (R. 859), and over our objection (R. 860) read from a book "The Flying Saucer Conspiracy", referring to the disaster at bar (R. 858-859). Neither the book nor its author's conclusions are in evidence. We can only feel that Transocean's references thereto not only were highly improper, but they demonstrate its own awareness that it has no defense. If it had, such airy speculation need never have been resorted to.

In Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 436, the Court states:

"It is equally well settled, however, that an inference of negligence based on *res ipsa loquitur* arises in cases where a passenger on a common carrier is injured as the result of the operation of the vehicle and that the carrier is obliged to meet the inference by evidence sufficient to offset or balance it. (See Mudrick v. Market Street Ry. Co., 11 Cal.2d 724, 731-734 (81 P.2d 950, 118 A.L.R. 533); St. Clair v. McAlister, 216 Cal. 95, 98-99 (13 P.2d 924); Smith v. O'Donnell, 215 Cal. 714, 721-722 (12 P.2d 933); O'Neill v. City & County of San

Francisco, 209 Cal. 418, 420 (287 P. 449);
Scarborough v. Urgo, 191 Cal. 341, 346
 (216 P. 584); Dowd v. Atlas T. & A. Serv. Co.,
 187 Cal. 523, 531-532 (202 P. 370); White v.
Red Mountain Fruit Co., 186 Cal. 335, 337-338,
 340-342 (199 P. 318); Rystinki v. Central Calif.
T. Co., 175 Cal. 336, 344 (165 P. 952); Housel
v. Pacific Elec. Ry. Co., 167 Cal. 245, 247
 (139 P. 73, Ann. Cas. 1915C 665, 51 L.R.A.N.S.
 1105); Valente v. Sierra R. Co., 151 Cal. 534,
 539 (91 P. 481); Cody v. Market St. Ry. Co.,
 148 Cal. 90, 92-93 (82 P. 666); Osgood v. Los
Angeles etc., Co., 137 Cal. 280, 282 (70 P. 169,
 92 Am.St. Rep. 175, 5 L.R.A. 498); Boyce v.
California Stage Co. (1864), 25 Cal. 460, 467-469;
Fairchild v. California Stage Co. (1859), 13 Cal.
 599, 603-605.)"

We note the presence in this array of citations of the
 air carrier case Smith v. O'Donnell, 215 Cal. 714, where the
 Court states (page 722) that defendant must overcome res ipsa
 "by proof that there was in fact no negligence".

In Dierman v. Providence Hospital, 31 Cal.2d 290, the
 Court states (page 295):

" . . . The general principle is, as stated
 by this court in 1919 (in denying a hearing in

Bourguignon v. Peninsular Ry. Co., 40 Cal. App.

689, 694-695 (181 P. 669)) 'that where the accident is of such a character that it speaks for itself, as it did in this case, . . . the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident, in which cause no element of negligence on the part of the defendant inheres, or (2) of such care in all possible aspects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory in the sense that it covers all causes which due care on the part of the defendant might have prevented.'"

In the instant case reasoning by exclusion has eliminated bad weather (R. 58) and sabotage (R. 360), but on this record it has failed to eliminate the other causes which Respondents' due care might have prevented.

In Talbert v. Ostergaard, 129 Cal. App. 2d 222, the

Court states that if "defendant fails to produce substantial evidence of the use of due care, as where he fails adequately to disclose the nature of an inspection he was required to make, his defense may be held insufficient as a matter of law. (Chutuk v. Southern Calif. Gas Co., 218 Cal. 395, 399-400 (23 P. 2d 285); O'Connor v. Mennie, 169 Cal. 217, 226 (149 P. 674). See Dierman v. Providence Hospital, supra.)"

Tested by these rules, we believe that Transocean, as well as Slick, has failed to rebut the inference of negligence against them in this case. Neither has offered evidence of any explanation for the accident. Neither has offered evidence of care in all possible respects. Accordingly, we believe that judgment in their favor is error as a matter of law.

B. Inference Not Dispelled by Presumption of Due
 Care of Deceased Pilots

Where res ipsa applies, "The negligence which may be inferred is a sort of blanket negligence, spreading over the whole case, and requiring the defendant, if he is successfully to rebut it, to stop every gap through which an inference of negligence might be drawn." (Nysted v. Wings, Ltd., 51 Man. Rep. 63 (1942) 3 D. L. R. 336.) Thus the inference blankets every species of act or omission which could have caused the crash, not merely the conduct of the pilots. There is authority that the presumption of due care does not apply as against a

passenger in a carrier case (Parrot v. Wells Fargo & Co., 82 U. S. 524, 538.

That the inference is not dispelled is the inevitable conclusion to be drawn from Des Marias v. Beckman, 198 Fed. 2d 550 (Cir. 9) and Haasman v. Pacific Alaska Air Express, 100 F. Supp. 1. There the airliner disappeared without a trace, yet judgment was for plaintiffs based solely upon application of res ipsa. It is clear that many more elements enter into the sum total of an air carrier's exercise of proper care than the conduct of its pilots.

C. Inference Not Dispelled by Evidence of Specific Acts of Negligence.

Appellants' complaint alleges negligence against each respondent in general terms (V. 1, R. 1-13). At trial, we requested a ruling as to whether res ipsa applied in order that we might be guided in respect to the presentation of evidence (R. 6, 7, 89, 90). The Court ruled that res ipsa did not apply, and that we should proceed with the case (R. 90). Based upon that ruling, we adduced into evidence specific acts of negligence. We do not believe that this precludes our right to rely upon the inference of negligence raised by res ipsa.

In Leet v. Union Pac. R. R. Co., 25 Cal.2d 605, cert. denied 325 U. S. 866, the Court states (page 619):

" . . . It must be concluded therefore that

if plaintiff alleges negligence specifically and generally he may rely upon the doctrine and the general inference of negligence flowing therefrom without limitation to the particular acts of negligence alleged inasmuch as by the general allegation of negligence defendant is notified that he must meet such a broad inference."

We note in passing that this was an action brought under the Federal Employers' Liability Act for wrongful death, applying the doctrine of res ipsa. We submit that the inference in our own case likewise was not dispelled.

III.

THE DISTRICT COURT ERRED IN FAILING
TO GIVE APPELLANTS JUDGMENT BY
REASON OF THE CLEAR PREPONDERANCE
OF EVIDENCE.

A. Admiralty Appeal Authorizes This Court
 To Reweigh Evidence De Novo.

This is an admiralty appeal and in such Appellants are entitled to a trial de novo. As the familiar rule has been applied, this means that the decree of the District Court is deemed vacated and the evidence will be weighed by this Court anew. Where the findings below, as is the case here, are "clearly against the preponderance of evidence", they must be set aside for manifest error. Koehler v. United States (C.A. 7) 187 F.2d 933, 936; The Vinemoor (C.A. 9) 75 F.2d 28; Wilson v. Inter-Ocean SS Corp. (C.A. 9) 163 F.2d 459; Mullen v. Fitzsimmons and Connell Dredge & Dock Co. (C.A. 7) 199 F.2d 557, cert. den. 344 U.S. 933; The Ernest H. Meyer (C.A. 9) 84 F.2d 496, cert. den. 299 U.S. 600.

In the instant case the trial court's findings and judgment disregarded the clear preponderance of the evidence.

B. Specific Acts Tending To Show Negligence
 As Against Transocean.

1. Faulty Auto Pilot Maintenance. An auto pilot is an electronic system which automatically controls the airplane in flight (R. 201). Briefly, it works by means of a flight gyro spinning at high speed which produces signals which an amplifier interprets and transmits to surface controls (P's Ex. 21). Separately, an altitude control unit mounted in the amplifier automatically keeps the plane at a constant barometric pressure altitude (R. 220, P's Ex. 21). The altitude control is limited to 6° change of pitch; the flight gyro is not so limited (R. 295).

N 90806 carried a PB-10 auto pilot and altitude control (R. 220, 255, P's Ex. 21). George McClain, Transocean's supervisor of operational training (R. 137), testified that "on long over-water flights the airplane is flown on auto-pilot, which necessitates very little attention from the pilots. In other words, they monitor the radios and see that everything is working O. K. " (R. 145-146).

The flight logs for N 90806 disclose a long history of difficulty with the auto pilot. During the two-year period commencing June 26, 1951, its pilots recorded over 50 complaints or "squawks" relating to this flight control system (P's Ex. 13), including "auto pilot inoperative", "auto pilot very erratic", "auto pilot rudder NG", "auto pilot sluggish",

"auto pilot slightly jerky on elevators", "auto pilot unreliable", "Auto pilot inoperative, goes into immediate dive when engaged." (P's Ex. 13). Then come the following: May 27, 1953, "Auto pilot altitude control pushes nose down. Need elevator nose up trim to keep ship level" (R. 211); May 28, "Auto pilot oversensitive, When engaged has abrupt nose-down tendency" (R. 212).

Raymond E. Babb, Transocean's instrument man, attempted to correct these squawks by replacing tubes, rectifier and a bulb (R. 217). He did this after the airplane had passed through Burbank with no corrective action taken by Slick (R. 212, 215). In taking his corrective action, Mr. Babb assumed both squawks were the same (R. 227), although in fact they were separate complaints (R. 228). He knew that auto pilot amplifiers required periodic time changes (R. 229) but didn't know the time on this amplifier, and made no effort to find out (R. 229). The amplifier contains the highly critical flight gyro (R. 541). Mr. Babb readily admitted that the May 28 squawk above could have been due to something going wrong with the flight gyro. Yet the flight gyro was not checked (R. 230).

The operating specifications for N 90806 (P's Ex. 10, p. 1075) require the auto pilot amplifier to be changed every 2000 hours. William L. Keating, Transocean's vice president in charge of operations, testified that the time limitations

found in the operating specifications should be observed not only as a matter of good practice, but by requirement of the Civil Aeronautics Administration (R. 762). Civil Air Regulations, §42.5, makes the operating specifications a part of the air carrier's operating certificate and prohibits operation contrary thereto. Yet at the time N 90806 crashed, its auto pilot amplifier had over 2100 hours on it (P's Ex. 8). Not only did this exceed authorized operating limitations (C. A. R., §42.32(d)(1), but Slick's records show it was nearly as much as the last two previous overhauls of the same unit (P's Ex. 8), on the second of which records show the gyro roto bearings were found frozen (P's Ex. 30).

Mr. Babb further testified that in order to correct a "nosedown tendency" auto pilot squawk, he would first try to find out if the captain was operating with altitude control on or off, and that would "narrow the cause down" (R. 222). He admitted that he did not do that here (R. 222). Mr. Babb's work did not correct the fault, for on May 30 and May 31 two further auto pilot squawks appeared in the logs (R. 235).

On June 2, Mr. Babb overhauled the altitude control unit. This was Transocean's first experience at overhauling such a unit (R. 206), and likewise Mr. Babb's (R. 242). Ordinarily, it would be done by Slick (R. 210, 256). George Shaw, a Transocean inspector, testified that he was not familiar with the PB-10 auto pilot (R. 324-325) but witnessed

a ground run on the system, and based thereon cleared the squawk (R. 327). He had never before seen an overhaul of this type (R. 326, 330), and testified that the mechanical department "both overhaul and inspect its own work" (R. 328). The policy against this practice in connection with an article which is critical to safe flight is set forth in Civil Air Regulations, §52.45, and Civil Air Manual (C. A. M.) §52.45-1 (P's Ex. 28):

"(c) Maintenance operations requiring a double inspection. Any maintenance operation which, if performed improperly, could be critical to the safe flight of an aircraft must be given a double inspection. The nature of the particular operation will be the governing factor in determining whether such operation shall be given a double inspection. A double inspection refers to that type of inspection wherein an article is repaired or altered by one individual and examined by a second individual in order to reduce to a minimum the possibility of error. Of the two individuals involved in a double inspection, only one need be a qualified inspector assigned for that purpose by the repair station. The mechanic accomplishing the particular maintenance operation may perform the first inspection; however, the

qualified inspector must perform the second or final inspection. Operations requiring double inspections include, but are not limited to, the following: * * * *

"(6) The overhaul or repair of any accessory used in the flight control system of an aircraft."

Mr. Shaw testified that it was his duty to see that the work was done and the flight squawk was corrected; that this meant finding the actual source of the trouble (R. 335). But here he hadn't seen Mr. Eabb do the work (R. 333), and although he knew that other items might produce the same flight symptoms (R. 335), none were checked (R. 335-336). Although established flight check procedures exist (R. 336), no records of any flight check ever were produced (R. 337). And although Civil Air Regulations, §18.20, requires a detailed overhaul record of the work done, none was made here (R. 243).

The foregoing not only demonstrates the general character of Transocean's maintenance operation with N 90806, but also connects with the testimony of William A. Tracy, an expert witness for Appellants. Captain Tracy testified that an "abrupt nose down tendency" in an auto pilot may be expected to recur in the normal course of events unless fixed up, tested and inspected; that if the flight gyro should suddenly tumble, the airplane "just about goes out of control"; that bearings

last only so long and a burned out or frozen bearing would cause this (R. 269); that in one case he experienced the effect was so violent it tore seats loose and "tossed passengers to the roof" (R. 268). This testimony stands uncontradicted.

2. Inadequate Pilot Training. C. A. R. ,
§42.45, provides:

"Proficiency of crew members serving
on large aircraft. Each air carrier shall establish
a training program sufficient to ensure that each
crew member used by the air carrier is adequately
trained and maintains adequate proficiency to
perform the duties to which he is to be assigned.

"(a) The training program shall consist
of appropriate ground and flight training, including
all subjects contained in the Operations Manual.
Procedures for each crew function shall be
standardized to the extent that each flight crew
member will know the functions for which he is
responsible.

"(b) No air carrier shall initially assign an
individual as a pilot unless he has satisfactorily
accomplished a written examination by the carrier
to ensure his familiarity with the contents of the
Operations Manual and with all types of instrument

approach and navigational facilities and procedures to be used. All pilots utilized by an air carrier shall accomplish such written examinations at intervals not to exceed six months.

" . . . "

C.A.M., §42.45-1, provides:

"(c) Emergency procedures. The training program shall include instruction in emergency procedures particularly with respect to engine failure, fire in the air or on the ground, evacuation of passengers, location and operation of all emergency equipment, power settings for maximum endurance and minimum range, etc."

Transocean's Flight Operations Manual states that C.A.R. §42.45 is "the minimum and not the optimum desired" (P's Ex. 9). Yet the record in this case shows discrepancies as follows:

(a) Captain William L. Word. Captain Word never took a course on DC-6 emergency procedures (R. 134). Captain Tracy testified that emergency procedures are very important to a pilot's operational qualifications. It trained him to detect trouble and to take steps to correct for it (R. 264). George McClain, Transocean's witness, agreed (R. 159). It is obvious that the accident in suit

presented an emergency situation.

(b) Co-pilot Herbert A. Hudson. Not only was Mr. Hudson absent from the course on emergency procedures, but he missed 30 out of 54 hours of instruction given on the DC-6 during the same period (R. 140-141). No other ground school course on the DC-6 was ever given (R. 140).

A written examination on the operations manual is required every six months. The manual contains a chapter on emergency procedures (R. 739). But Mr. Hudson's last such examination was June 10, 1952, 13 months before the accident (R. 755).

Defendants' Exhibit K shows that after being assigned to DC-6's, Mr. Hudson was transferred to DC-4's on December 1, 1952, and was reduced to co-pilot on March 1, 1953. He was retransferred to DC-6's April 1, 1953, and given his first flight check June 16, 1953. He failed, and the C. A. A. form of disapproval was placed in his file (P's Ex. 12). Transocean's chief pilot told Mr. McClain to work with Mr. Hudson and "bring up his proficiency" (R. 150). A revenue flight to Honolulu followed on June 17-18 wherein Mr. Hudson was co-pilot. McClain logged 14 hours of instruction for Mr. Hudson on these days, despite the fact that they were tired from the flight (R. 148). On July 1, 1953, Mr. Hudson was re-examined as to the oral portions of the examination, and

passed (P's Ex. 12).

3. Excessive Pilot Scheduling
Inducing Fatigue.

(a) Inadequate ground rest. On July 10, 1953, N 90806 departed Oakland for Guam as Flight 109. It arrived at Honolulu at 1437 July 10, 9 hours 58 minutes later (R. 67). Captain Word and his crew were then waiting at operations ready to take over the flight (R. 676). A crew change was effected and the flight departed at 1740. It landed at Wake Island 8 hours 21 minutes later, departed Wake at 0301 with the same crew, and arrived at Guam at 0845 on July 11. The crew went off duty at 0905 (R. 67-68). Thus for the complete Honolulu-Guam trip the total flying time was 14 hours, 2 minutes, and total duty time was 18 hours, 28 minutes.

The same crew reported for duty at 2300, 13 hours, 55 minutes later (R. 69). Designated as Flight 512, N 90806 departed Guam for Oakland with this crew at 0004 on July 12. The flight landed at Wake Island at 0539, 5 hours, 35 minutes later. It departed Wake with the same crew at 0658 (R. 70-71) and crashed at approximately 0840 (R. 59). Thus out of 42:03 hours N 90806 had taken to get from Honolulu to Guam to the point of crash, Captain Word, Co-pilot Hudson, and Second Officer Nowell spent:

28:08 hours on duty;

22:19 hours aloft, and

13:55 hours off duty.

Under these circumstances, that these pilots were in a state of fatigue can hardly be doubted. Captain Keating testified that Transocean's Honolulu-mainland flights average about 9 hours (R. 741), and the crew taking the flight to Honolulu "would rest there normally a minimum of 36 hours" before flying again (R. 741). He considered this to be "good practice" (R. 746). If it was good practice at Honolulu, it is hard to see why it should not be good practice at Guam. Yet Transocean failed to follow that practice here.

Transocean's operations manual required that for a flight crew of 3 pilots, "flight hours shall be scheduled in such a manner as to provide for adequate rest periods on the ground" (R. 739-740). Lawrence E. Morehouse, called as an expert witness for Appellants, testified that he was a professor at U. C. L. A., a physiologist with a specialty in aviation medicine, and has completed broad studies in pilot fatigue (R. 299-300). Reports of his work had been published in the Journal of Aviation Medicine. He was a lecturer for the Air Force on flying fatigue (R. 301). When fatigue sets in, a pilot's standards of acceptance deteriorate, instruments are overlooked, response is slower and less accurate, and wrong judgments are made (R. 306-307).

In response to a hypothetical question describing the

instant case, Dr. Morehouse testified (1) that the pilots of N 90806 did not have an adequate rest period at Guam; and (2) that at the time of the crash they were in a fatigued state (R. 314).

(b) Inadequate Flight Rest Facilities.

Transocean's manual also required "adequate sleeping quarters on the aircraft" where 12 out of 24 hours were scheduled aloft (R. 740). Aloft time here was 14:02 hours within the last 24. N 90806 carried only one crew bunk (R. 174). Dr. Morehouse testified that this, too, was not adequate (R. 314). Captain Tracy, who had 17 years experience as an airline pilot (R. 260), testified that adequate rest was very important to safe flying, and this required facilities on the aircraft as well as ground rest; that usually 2 or 3 bunks are carried by aircraft with a multiple flight crew on over-water flights (R. 262-263). This testimony stands uncontradicted.

(c) Crew change indicated but not made.

Transocean's vice president in charge of operations, Captain Keating, testified that on trans-Pacific flights, "I consider it to be good practice" to change flight crews at Wake (R. 746). He testified Transocean had aircraft other than N 90806 flying regularly over the Pacific, and it wouldn't have been any particular trouble to ferry a relief crew out to Wake (R. 747).

Captain Tracy stated this was the usual procedure, so "a fresh crew would be on deck to take the trip" (R. 262). Captain Buckalew testified that this was a "sound practice" (R. 692). Yet Transocean failed to follow that practice here.

Captain Tracy testified that in operational malfunctions, a preliminary warning usually comes before the malfunction becomes critical to flight (R. 265); that during this period a pilot would start taking corrective steps (R. 265). It need not be labored that pilots who are in a fatigued state will not sense a forewarning as effectively as rested pilots. This is particularly so where the fatigued pilots have had no special training in emergency procedures. It is no wonder then that Dr. Gerundo, the autopsy surgeon, concluded that from what he found there was no evidence of forewarning (R. 186).

(d) Inadequate Preflight Action.

(i) No preflight check list received at Wake. Flight 512 landed at Wake Island at 0539, July 12. There the crew checked weather and filed a flight plan showing, among other things, estimated time of departure, 0730 (P's Ex. 26). Instead, the flight departed at 0658 (R. 57). Although a pilot's preflight check list is usually completed and delivered to ground personnel before take-off, this was not done here (R. 57, 715),

C. A. R., §42.31(a): "Aircraft shall be given a

preflight check to determine compliance with §42.51(e)

. . . "

C. A. R., §42.51(e): "Prior to starting any flight, the pilot shall determine that the aircraft, all engines and propellers, appliances and required equipment, including all instruments, are in proper operating condition. If during the flight any such engine, propeller, appliance, or equipment malfunctions or becomes inoperative, the pilot in command shall determine whether the flight can be continued with safety. Unless he believes that flight can be continued safely, he shall hold or cancel it until satisfactory repairs or replacements are made."

Transocean's Flight Operations Manual (P's Ex. 9) provides that a "preflight inspection will be signed off and dated at each and every stop."; and again "Before any flight may be started, both the captain and dispatcher must agree that the flight may be accomplished with safety and in accordance with C. A. A. regulations. Their agreement shall be indicated by their signatures on the flight clearance."

C. A. R., §42.60(d): "No operation shall be conducted by the air carrier contrary to the safety provisions of the operations manual."

From the fact that N 90806 departed Wake 32 minutes early, it is a fair inference that departure was hurried. This

would explain why no preflight check list or clearance was signed off by the captain. But it can never justify it. Nor can Transocean, by saying their crew chief made a preflight inspection, show compliance with the plain intent of the foregoing requirements.

(ii) Cockpit check list squawked.

The flight log for June 26, 1953, recites: "Replace T. A. L. (Transocean Air Lines) cockpit check list with Slick cockpit check list." On the reverse side appears: "No Slick list in stock" (P's Ex. 4).

C.A.R., §42.25: "The air carrier shall provide for each type of aircraft a cockpit check list adapted to each operation in which the aircraft is to be utilized . . . "

The importance of proper check list in the operation of a complex mechanism requires no emphasis. This is particularly so where that mechanism is an airplane used in passenger common carriage. Transocean operated no DC-6 other than N 90806. That airplane came from Slick. Although the lack of a Slick check list was squawked, it nowhere appears that this discrepancy ever was corrected.

C. Specific Acts of Negligence as Against Slick.

1. Omitted Test Flights. Captain Tracy testified that usually an airplane is test flown after an engine

change (R. 264). Samuel Wilson, Transocean's executive vice president, agreed that normally the airplane is test flown around the field to see that everything is working properly (R. 363-364); also, that if the plane is released "O.K. for test hop", it would be good practice to test fly it (R. 363).

On July 2, 1953, Slick changed No. 4 engine on N 90806 (R. 45). Thereafter it was ferried to Oakland from whence it departed for Honolulu and Tokyo (R. 45-46). On the return trip the No. 4 engine seemed to lose power, and after arrival back in Oakland the plane was ferried to Burbank on 3 engines. There No. 4 was again replaced (R. 46-47). The flight log was signed off "O.K. for test hop" (P's Ex. 15), but no flight test as such was ever run (R. 48).

Usually, a flight test begins and ends at the same station (R. 364). Yet in neither of these engine changes was this done. As a result, discrepancies were first discovered in Honolulu on July 9, 1953, after the second installation (R. 50). No corrective action was taken there as to all but one item (R. 50), and none was taken by Slick after the airplane returned to Burbank. No reason appears why Slick omitted this servicing, other than that Transocean had scheduled the plane out of Oakland on July 10 (R. 52), and was probably in a hurry to get it. This was N 90806's last westbound flight.

2. Auto Pilot Amplifier Exceeded

Authorized Time Limit. Slick had the history cards on this unit (P's Ex. 8). Its use was limited to 2,000 hours according to the operating specifications in evidence (P's Ex. 10, page 1075). This was the unit which contained the critical flight gyro (R. 541). Yet Slick permitted it to run over 2,100 hours at the time of the crash (P's Ex. 8), contrary to sound practice (R. 762) and law C.A.R., §§ 42.5, 42.51(a)(1), 42.32(d).

3. Omitted Maintenance. Maintenance of the auto pilot is required to be in accordance with the Pioneer Service Manual (Slick Maintenance Manual, page 4227, P's Ex. 11). The Pioneer Service Manual (P's Ex. 36) requires ground checks, preflight checks, flight checks, and periodic checks every 90 days to be made. It specifies the procedure for each. This record fails to show that these specific checks were accomplished. The May 27, 1953, squawk "auto pilot alt. control pushes nose down" came on a flight which terminated at Honolulu. There the ground crew released N 90806 to Burbank with the notation for this item on the reverse of the log sheet, "No action. O.K. thru". On the flight to Burbank the pilot noted in the log "Auto pilot over-sensitive, when engaged has abrupt nose down tendency" (R. 210-212). Nevertheless, Slick released the plane as air-worthy to Oakland without any action on this item (R. 214).

As seen, the practice was for Slick to maintain the auto pilot, not Transocean (R. 255). From this it may be inferred that Slick's shops and mechanics were better equipped to do the job.

Slick purchased N 90806 from Douglas April 18, 1951 (R. 42) and sold it to Transocean on June 26, 1952 (R. 43). The log sheets in evidence show a long history of malfunction with the auto pilot, over 50 separate squawks within some 2 years (P's Ex. 13, R. 774-778). The same sheets show other complaints not expected when an airplane is properly maintained, e. g., December 20, 1951: "Filthy with oil"; December 30, 1951: "This airplane could use some maintenance"; February 16, 1952: "This airplane is so oily and dirty it is becoming a fire hazard"; May 22, 1952: "Auto pilot inoperative. Goes into immediate dive when engaged". On June 18, 1953, on a flight from Honolulu to the mainland, the No. 4 engine lost all fuel pressure after some 2-1/2 hours out. The pilot dumped 1000 gallons of fuel, and returned to Honolulu on 3 engines. On 8 separate flights of N 90806 during the 9 days before it last arrived at Honolulu, the logs show trouble with the No. 4 engine (P's Ex. 15). The log sheets for the trip thereafter went down with the airplane.

We do not believe that an airplane properly maintained, repaired and inspected will reflect the foregoing condition.

IV.

THE DISTRICT COURT ERRED IN MAKING CERTAIN FINDINGS OF FACT.

For brevity, the findings objected to will be set forth with the erroneous portions italicized. In all specifications the ground of objection is that they are unsupported by a preponderance (this being an admiralty appeal), or any, evidence.

Finding No. XIV: "No maintenance work of a mechanical nature was performed on said aircraft after its arrival at Guam on July 11, 1953, or while at Wake Island on July 12, 1953, as none was required or necessary."

Finding No. XVIII: "Take-off from Wake Island was at 0658, July 12, 1953. A total gross weight of the aircraft at take-off was 94,397 pounds, which was within the allowable gross take-off weight of 100,000 pounds; the load was properly distributed relative to the approved C. G. limits."

Finding No. XXI: "No primary structure of the aircraft was recovered; therefore, it was not possible to determine if a structural or mechanical failure of the aircraft occurred while in flight."

Finding No. XXII: "The aircraft received routine servicing on both the west and eastbound flights. There is no record of any mechanical trouble having been reported on

either of these flights. An examination of the records reveals nothing that would indicate that the aircraft was unairworthy when it left Wake Island. The maintenance records of the aircraft indicate that the aircraft had been maintained in accordance with CAA and Company approved procedures."

Finding No. XXV: "The crew were provided with adequate facilities for rest while in flight. . . . Prior to leaving Guam, the crew had rested adequately and were in a proper state of health to continue with their duties."

Finding No. XXVI: "When last observed on Wake, the crew was not suffering from fatigue, illness, worry or disability of any nature."

Finding No. XXVII: "Whatever occurred to cause the crash apparently occurred without giving any warning or opportunity for corrective action on the part of the crew."

Finding No. XXVIII: "The probable cause of the accident cannot be determined."

Finding No. XXIX: "The personnel of Transocean, which made up the crew on the fatal flight, were experienced, certificated, and well qualified to handle their respective duties. Transocean maintained a training program and periodically checked their personnel to keep them up to a high degree of proficiency."

Finding No. XXX: "Transocean compiled a voluminous manual on standard operating procedure patterned after the

CAA regulations and saw to it that their personnel lived up to the regulations. "

Finding No. XXXI: "N 90806 was maintained by Slick in an airworthy condition. "

Finding No. XXXIII: "Transocean was not negligent in the operation or maintenance, or otherwise, of N 90806. "

Finding No. XXXV: "Slick was not negligent in the maintenance, or otherwise of N 90806. "

Finding No. XXXVI: "N 90806 was maintained by Transocean in an airworthy condition. "

Finding No. XXXVII: "N 90806 was in an airworthy condition when it left Wake Island at 0658, July 12, 1953. "

V.

THE DISTRICT COURT ERRED IN FAILING
TO MAKE FINDINGS OF FACT AND CON-
CLUSIONS OF LAW DISPOSING OF APPELLANTS'
CLAIMS FOR LOSS OF BAGGAGE AND REFUND
OF FARES PAID.

When Transocean sold passage to the parties in Guam, it contracted to transport them and their baggage to Oakland. For this Maria G. Muna paid Transocean \$650.00 (round trip) for herself and \$162.50 for her son, Francisco. Catalina M. Guiterrez paid \$325.00. Value of the baggage was the subject

to testimony by members of the family on Guam (R. 408, 527).

The crash represents a clear case of deviation from the transportation contracted for, deviation compounded by Transocean's negligence. It resulted not only in the loss of the baggage, but in sudden and tragic death. "In the case of passengers, the carriers are responsible for negligence only; but in respect to their baggage, they are responsible as common carriers and accident is no excuse." (10 Am. Jur. 442).

Under the Death on the High Seas Act, only one cause of action exists for all pecuniary loss sustained by one's "wrongful act, neglect or default". The price paid for the tickets and value of the baggage, although relatively minor items, are nonetheless part and parcel of "the pecuniary loss". Appellants are entitled to recover therefor, and we believe that the Court erred in failing to find for Appellants on these issues.

CONCLUSION

For the foregoing reasons, the judgment in favor of Respondents Transocean and Slick should be reversed.

Respectfully submitted,

A. J. BLACKMAN,

Attorney for Appellants.

No. 1 5 4 4 6 (In Admiralty)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator
of the Estate of Maria G. Muna,
deceased, et al,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC.,
a corporation, et al,

Respondents.

FILED

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APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION
HON. THURMOND CLARKE, JUDGE

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APPELLANTS' REPLY BRIEF

I

RES IPSA LOQUITUR APPLIED

Although in the trial court Transocean denied that res ipsa applied, nowhere does it flatly deny it here. It says there is a "dearth of authority" (p. 15), but ignores Appellants' authorities (Op. Br. pp. 22-25). The language quoted from Smith v. Penna. Central Air Lines, 76 Fed. Supp. 940, is pure dictum found in a case where the court actually applied the doctrine. Of the eight cases cited by Transocean (p. 17) which did not apply the doctrine, only one involved a common

carrier plane crash, Wilson v. Colonial Air Transport, 180 N.E. 212 (Mass.), decided back in 1932. The others were decided 1943 or earlier, except Cudney v. Mid-Continent Air Lines (Mo.) 254 S.W. 2d 662, which did not involve a crash. Even the Cudney case states it is now generally accepted that the doctrine applies as against a common carrier under other circumstances, and points out that it "has been recently applied to the unexplained disappearance of a commercial airliner from Yakutat, Alaska to Seattle", citing Haasman v. Pac. Alaska Air Express (100 Fed. Supp. 1, aff'd. as Beckman v. Des Marias, 198 Fed. 2d 550 (CA-9)). We cited the Beckman and Haasman cases in our opening brief as persuasive authority, but Transocean has ignored them.

Slick concedes (its Br., p. 7) that res ipsa applies as against a common carrier, but argues that the doctrine does not apply as against Slick. Such argument essentially is based upon the difference between Transocean and Slick in their relationship to the passengers aboard the ill-fated aircraft, not upon any difference between them in the probabilities involved. Accordingly, we submit that such argument is unsound. By law, Slick (like Transocean) was under an affirmative duty to inspect N 90806 and maintain it in airworthy condition (Civil Air Regulations [C.A.R.] §18.30 et seq.). By contract, Slick was under a like duty (R. 45).

True, the measure of Transocean's duty as a carrier

was one of utmost care. But if the probabilities exist that a DC-6 airplane does not, in the ordinary course of things, crash unless there has been a failure to inspect, service or maintain it properly, res ipsa should apply against the maintenance firm the same as the air carrier. In Woods v. Kansas City, etc. R. Co., 134 Kan. 755, 8 Pac.2d 404, a passenger was given the benefit of res ipsa as against two railroads, one which owned the car and the other which cared for it. Even if such failure was only contributory to the crash under the probabilities, the result should be the same. Other cases supporting the general principle cited by us (Op. Br. pp. 16-21) have not been answered, and Slick's cases are readily distinguishable on their facts.

II

THE TRIAL COURT DID NOT APPLY THE DOCTRINE

The statement by the trial judge that res ipsa did not apply constituted more than "remarks" as Transocean says (p. 14). The Court itself referred to it three separate times in terms of "ruling" (R. 90), concluding with "I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the court's ruling." (Italics added.) Of course a ruling during trial may be subject to a motion to reconsider, but unless expressly changed by the court it is fair to assume

it stands, as it here was fairly intended to stand, as an Order made to control the case.

In San Diego Gas & Elec. Co. v. U.S., (CA-9) 174 Fed.2d 92, 94, this Court stated:

" * * * This judicial comment is in effect a finding that the evidence adduced, taken at its face value, cannot support an inference either of negligence or of a violation of warranty. The last and concluding thought in the comment is " * * * the record shows no basis for liability." This ruling, as would be a formal finding to the same effect, is clearly erroneous."

III

WITH RES IPSA, APPELLANTS WERE ENTITLED TO JUDGMENT

Transocean's argument to the contrary is that res ipsa in admiralty is a "watered down version" which does not require an explanation of the cause of the accident (p. 17). How much weight is to be given the inference begs the question where as here the trial judge ruled that it didn't apply. The real questions are (1) whether the Court prejudicially erred in so ruling, and (2) whether the inference plus the other proofs in the record make the findings and judgment "clearly erroneous". We submit that the answer should be "Yes" where as here

Respondent offered no evidence to explain the cause of the crash. In Bergen v. U. S. (CA-9) 222 Fed.2d 949 (1955), Plaintiff was a passenger of the Alaska Railroad, a Government instrumentality, at the time the car in which he was riding derailed and turned over. The District Court gave judgment for defendant on the ground that there was no showing of negligence. Held, reversed. The Court states (p. 950):

"The cause of the wreck we do not know. * * * However, we believe that this was clearly a case of an instrumentality and events solely within the control of the defendant and a case for the application of res ipsa loquitur. The burden of going forward on negligence was upon defendant, and the plaintiff's abortive attempt to prove the cause of the wreck, we hold, did not remove this burden."

And in Austerberry v. U. S. (CA-6) 169 Fed.2d 583, a suit in admiralty arose out of explosion on a coast guard vessel. Libellant relied upon res ipsa loquitur and went on to show by an expert witness that there were leaks found in the gas line which could cause fumes to accumulate in the bilge. The Government's expert said differently. The trial court found no negligence and gave judgment accordingly. Held, reversed. The Court states:

"In admiralty, the doctrine of res ipsa loquitur is applied (citations) * * * (T)here is a complete absence of any explanation for the explosion other than one caused by fumes escaping from the leaking tank and the exposed gas line. Further, there is no evidence of regular inspection of the tank or the bilges. From the considerable body of evidence in the case relating to these conditions and happenings, it is our conclusion that the circumstances of the explosion and the proofs in the case established the negligence of appellee, under the doctrine of res ipsa loquitur."

The instant case shows numerous acts of negligence as against both respondents (Op. Br. pp. 33-49). Some, Respondents have not even replied to. Others are simply glossed over. For example, Transocean says that Babb "completely overhauled" the auto pilot on June 2, 1953. He did no such thing. Slick should have done the work required on the auto pilot, but ignored the squawk. When the airplane arrived at Oakland, Transocean's mechanic Babb cleared the squawk by overhauling the altitude control unit only (R. 239), this despite the fact that he didn't check to see what gave rise to the trouble. He admitted that it could have been due to the flight

gyro, which was not checked (R. 230). At the time of the accident the amplifier of which this vital unit is a part had exceeded its authorized operating time (Op. Br. 48). Even the work that Babb did lacked required records (C. A. R., §18.20) and double inspection (C. A. R., §52.45).

In Chutuk v. So. Cal. Gas Co., 218 Cal. 395, 399, the Court states:

" * * * If complaints had been made and no attention had been paid to them, such a fact might constitute additional evidence of the negligence of the defendant; but the fact that no complaints had ever been made relative to the situation would have no tendency to prove affirmatively that care had been exercised on the part of the defendant. And the same principle would apply with reference to the average length of the life of the gas pipe. If its age limit had expired, that fact might well be an item tending to show lack of care; but because the pipe was generally still in good, serviceable condition has no tendency to prove that in the circumstances present herein the defendant was not guilty of negligence."

As to the excessive scheduling and pilot fatigue,

Transocean's answer is likewise erroneous and incomplete. That it was good practice for a passenger airline flying trans-Pacific to change crews at Wake Island was testified to by Transocean's Vice-President, William L. Keating, and such testimony was not limited to two pilot crews as Transocean says (p. 12) (cf. R. 746 and Op. Br. pp. 43-44). Further, Transocean wholly ignores the expert testimony of its own pilot, Captain Buckalew, and of Captain Tracy corroborative of this. Yet on N 90806 Transocean worked the same crew straight through -- both ways. Likewise as to a written pre-flight check list, while this is usually completed and delivered to ground personnel it was omitted prior to last departure of the aircraft from Wake Island. Such omission was contrary to Transocean's operations manual and law (Op. Br. 44-45). Indeed, Transocean never even furnished its pilots with a proper cockpit check list, as required by law (Op. Br. p. 46).

These are only some of the proven deficiencies. Can it be said that this record showed Transocean exercised the most care for its passengers, to safely carry and deliver them?

Respondents say the airplane was airworthy -- yet it crashed. Transocean says (p. 22) it is entitled to the presumption that its deceased pilots used ordinary care -- yet Transocean's duty was to use the utmost care and this blankets not only its pilots but each and every other phase of its operation.

It is not enough for Transocean to say (p. 21), "(I)t is common knowledge that aircraft have disappeared without apparent cause." In just such a case this court applied res ipsa and gave judgment against the air carrier (Haasman v. Pac. Alaska Air Express, (100 Fed. Supp. 1, aff'd, as Beckman v. Des Marias, 198 Fed.2d 550 (CA-9)). Nor is it persuasive for Transocean to blame flying saucers, guided missiles and the like (p. 21), as to which there is not a shred of evidence in this record.

IV

THE BAGGAGE, ETC. LOSS

Transocean says (p. 28) we have cited no responsible authority on this point. We thought we had (Op. Br. p. 53). But we add the thought expressed so aptly by Dean William L. Prosser, 37 Cal. L. R. 183, 222:

"It is surely a highly anomolous distinction, and a very strange preference of property values over human safety, which puts the burden of proof upon the carrier when it damages the passenger's trunk (citations), but not when it injures the man. No one has ever justified such a distinction, and no one, to the knowledge of the writer, has

ever tried."

CONCLUSION

We submit that the judgment in favor of Respondents Transocean and Slick should be reversed and the cause remanded on the issue of damages.

Respectfully,

A. J. BLACKMAN

Attorney for Appellants.

No. 15446 (In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria
G. Muna, deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Appeal From the United States District Court for the
Southern District of California, Central Division.

Hon. Thurmond Clarke, Judge.

Brief of Respondent Douglas Aircraft Corporation,
Inc.

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FILED

AUG 19 1957

PAUL P. O'BRYEN, CLERK

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Respondents.

Appeal From the United States District Court for the
Southern District of California, Central Division.

Hon. Thurmond Clarke, Judge.

Brief of Respondent Douglas Aircraft Corporation,
Inc.

Preliminary Matter.

In this brief Respondent Douglas Aircraft Corporation, Inc., will sometimes be referred to as "Douglas," Respondent Transocean Air Lines, Inc., will sometimes be referred to as "Transocean" and Respondent Slick Airways, Inc., will sometimes be referred to as "Slick."

In this brief the record will be referred to in the same manner utilized by Appellants and explained in the footnote on page 2 of Appellants' Opening Brief.

Jurisdictional Statement.

Respondent Douglas accepts the Jurisdictional Statement set forth on pages 1-3 of Appellants' Opening Brief.

Statement of Case.

Respondent Douglas accepts the Statement of the Case as set forth on pages 3-6 of Appellants' Opening Brief.

Questions Presented.

The questions presented herein and hereby are as follows:

1. Do Appellants seek reversal of the judgment insofar as the judgment is in favor of Douglas?
2. Does the express theory upon which the case was tried as against Douglas (to-wit, that *res ipsa loquitur* does not apply against Douglas) prevent consideration of the doctrine of *res ipsa loquitur* as possibly applicable against Douglas on this appeal?
3. Does Finding of Fact No. XXXIV which is not specified or assigned as, or claimed to be, erroneous, entitle Douglas to affirmance of a judgment in its favor?

Summary of Argument.

The argument hereinafter set forth will be devoted: Under Point I to showing that appellants' Opening Brief does not seek reversal of the judgment insofar as the judgment is in favor of Douglas; under Point II to showing that under the theory of Appellants and of Douglas at the trial the doctrine of *res ipsa loquitur* cannot be considered as even possibly applicable as against Douglas on this appeal, and, under Point III to showing that Douglas has been found by the trial court to have been guiltless of negligence, that such finding has not been specified or assigned as erroneous and that no evidence in conflict with such finding has been indicated by Appellants.

ARGUMENT.

I.

Appellants Do Not Seek and Do Not Attempt to Show Grounds for a Reversal of the Judgment Insofar as the Judgment Is in Favor of Douglas.

A careful study of Appellants' Opening Brief establishes that Appellants do not seek, have not requested, and have not argued for a reversal of the judgment insofar as Douglas is concerned.

The following excerpts from Appellants' Opening Brief are of significance upon this subject:

"While Douglas is a Respondent herein, it has been joined *only* so that the court can have all parties before it." (App. Op. Br. p. 3.) (Emphasis added.)

"CONCLUSION

"For the foregoing reasons, the judgment in favor of Respondents *Transocean* and *Slick* should be reversed." (App. Op. Br. p. 53.) (Emphasis added.)

An analysis of the arguments presented in Appellants' Opening Brief shows that there is no contention made by Appellants that the judgment in favor of Douglas is erroneous.

On page 6 of Appellants' Opening Brief under the heading "Questions Presented," Appellants state (p. 6):

"The basic issue involved in this appeal is whether the doctrine of *res ipsa loquitur* applies against an air carrier and maintenance firm, or either, sued in admiralty for the death of a passenger in an airplane crash on the high seas."

Since Appellants have earlier in their brief pointed out that the "carrier" involved is *Transocean* (App. Op. Br. pp. 1, 4], that the "maintenance firm" is *Slick* (App. Op.

Br. pp. 1, 5) and that Douglas is a “manufacturer” (App. Op. Br. pp. 1, 2, 4, 18), it is clear that Appellants do not attempt to involve Douglas in the “basic issue,” which concerns possible application of the doctrine of *res ipsa loquitur* as against Transocean and Slick. (We shall show under Point II hereinafter that the doctrine of *res ipsa loquitur* cannot be considered as even possibly applicable against Douglas on this appeal.)

Point I.A. of Appellants’ Opening Brief (pp. 11-16) is limited to an argument that the doctrine of *res ipsa loquitur* should have been applied as against Transocean.

Point I.B. of Appellants’ Opening Brief (pp. 16-22) is limited to an argument that the doctrine of *res ipsa loquitur* should have been applied as against Slick.

Point I.C. of Appellants’ Opening Brief (pp. 22-25) is an argument to the effect that the doctrine of *res ipsa loquitur* is not made inapplicable merely because an action is tried in admiralty under the Death on the High Seas Act.

Point II of Appellants’ Opening Brief (pp. 25-31) is limited to an argument that if the court did in fact apply the doctrine of *res ipsa loquitur* it erred in failing to award judgment to Appellants. (As we shall show under Point II of this brief, Appellants specifically represented to the trial court and to Douglas at the outset of the trial that Appellants did not claim that the doctrine of *res ipsa loquitur* had any application as against Douglas [R. 9] and no contrary view could be taken on this appeal.)

Point III.A. of Appellants' Opening Brief (p. 32) is simply an argument that upon an appeal in an admiralty case the court is authorized to reweigh the evidence.

Point III.B. of Appellants' Opening Brief (pp. 33-46) is, specifically, an argument that Appellants were entitled to judgment against Transocean.

Point III.C. of Appellants' Opening Brief (pp. 46-49) is, specifically, an argument that Appellants were entitled to judgment against Slick.

Point IV of Appellants' Opening Brief (pp. 50-52) quotes the findings which Appellants specified were erroneously made (and it is of significance that none of such assigned findings refers to Douglas or bears upon or touches any conduct of Douglas). (It is especially noteworthy that Finding of Fact No. XXXIV [V. 1, R. 49] wherein the trial court found that Douglas was guiltless of negligence is not among the findings so quoted, assigned or specified by Appellants.)

Point V of Appellants' Opening Brief (pp. 52-53) is simply an argument that Appellants were entitled to recover the value of certain personal property from Transocean, by virtue of decedents' contract with Transocean.

From the foregoing it is clear that Appellants do not seek, and do not attempt to show grounds for, a reversal insofar as the judgment is in favor of Douglas.

II.

The Express Theory Upon Which the Case Was Tried by Appellants Against Douglas Prevents Consideration of Any Possible Application of the Doctrine of *Res Ipsa Loquitur* as Against Douglas on This Appeal.

At the outset of the trial, and prior to the taking of any evidence, counsel for Appellants stated in open court that the doctrine of *res ipsa loquitur* neither could or should apply as against Respondent Douglas [R. 9].

It is thus clear that Appellants and Respondent Douglas tried, and the court decided the case upon the theory that the doctrine of *res ipsa loquitur* was inapplicable against Douglas.

We have shown under Point I of this brief that Appellants have not, in their Opening Brief, attempted to depart from the theory upon which the case was tried as against Douglas. In any event because of the theory upon which the case was tried, no consideration can be given to any idea that the doctrine of *res ipsa loquitur* might be considered applicable as against Douglas.

Said the court in *Raiche v. Standard Oil Co.*, 137 F. 2d 446 at 449:

“Having elected to try her case in the trial court on the theory that the burden of proof was upon her, she can not on appeal seek reversal on a different or inconsistent theory. *Loomis, Collector, v. Wattles*, 8 Cir., 266 F. 876; *Hatcher v. Northwestern Nat. Ins. Co.*, 8 Cir., 184 F. 23.”

In accord:

Lambor v. Yates, 148 F. 2d 137, 138, and cases cited therein.

III.

There Being No Contention, Argument or Specification That Finding of Fact No. XXXIV Was Erroneous, or Induced by Error, or Was Unsupported by the Evidence or Contrary to It, the Judgment in Favor of Douglas Should Be Affirmed.

There has never been allegation or contention in this case that the airplane, manufactured by Douglas, was defective in design, engineering or manufacture. In fact, it was stipulated, as Appellants say at page 18 of their Opening Brief, that the Douglas DC-6A aircraft was designed, engineered and manufactured as a fail-safe airplane, and that it is in current use by many of the larger scheduled airlines throughout the world with generally satisfactory operating results.

The complaint (or libel) alleges that Douglas in about April and May, 1953, had possession of the airplane for the purpose of accomplishing thereon certain modifications and alterations, including inspections thereof [V. 1, R. 3-4]. Such allegation was not and is not denied. It is then charged in the complaint: "Said crash was proximately caused by the negligent and careless manner in which defendant Douglas Aircraft Company, Inc., accomplished, if at all, said modifications and alterations [V. 1, R. 4]. Such charge was and is denied [V. 1, R. 15a].

At the trial Appellants did nothing toward establishing such charge of negligence and the record is void of such evidence. Nor do Appellants in their Opening Brief hint or suggest that there was any evidence of any negligence on the part of Douglas. But even if there *had* been testimony on the subject, which there was not, the trial court would not have been bound thereby and its finding would

still have been efficacious. (*Michner v. Hutton*, 203 Cal. 604, 265 Pac. 238; *Quock Ting v. United States*, 140 U. S. 417, 420, 35 L. Ed. 501, 11 S. Ct. Rep. 733, 734.)

The trial court found:

“XXXIV.

“Douglas was not negligent in the modifications and alterations, or otherwise of N 90806.” [V. 1, R. 49.]

Such unattacked finding of the trial court, standing alone, establishes that Appellants’ allegation of negligence as against Douglas was untrue. And particularly is that true since the record does not contain and Appellants have not pointed out any testimony or any evidence of any negligence on the part of Douglas.

Conclusion.

It is urged that the judgment in favor of Douglas and against Appellants be affirmed.

Respectfully submitted,

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No. 15446 (In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria
G. Muna, deceased, *et al.*,

Appellant,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

Hon. Thurmond Clarke, Judge.

BRIEF OF APPELLEE, SLICK AIRWAYS, INC.

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FILED

SEP 23 1957

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BRIEF OF APPELLEE, SLICK AIRWAYS, INC.

Preliminary.

Appellee, Slick Airways, Inc., will follow the method employed by Appellants in denominating the parties and making reference to the record.

Jurisdictional Statement.

Slick agrees with Appellants that the District Court had jurisdiction of this cause by virtue of the Death on the High Seas Act, that it was tried as an admiralty matter, and that this Court has jurisdiction of the appeal.

Statement of the Case.

Slick accepts the Statement of the Case presented by Appellants, except that it wishes to call attention to other pertinent facts.

Although Slick performed certain of the maintenance work under its contract with Transocean, the latter performed other servicing in connection with the aircraft. [R. 50.] The crash occurred on July 12, 1953, while the plane was westbound on a flight originating at Guam and destined for Oakland. The last time the plane was in the possession of Slick for the performance of maintenance work was July 7, 1953, when it replaced the number 4 engine. [R. 47-48.]

Thereafter, the aircraft was flown to Oakland, from where, on July 9th it was flown to Honolulu, then to Burbank and back to Oakland again. [R. 50-51.] There, it was serviced by Transocean employees. [R. 51.]

From Oakland, it was flown on July 10th to Honolulu with Captain Thomas Buckelew as pilot, where the aircraft was turned over to Captain Word, the pilot on the flight during which the plane crashed. [R. 685.] Captain Buckelew recalled no difficulties with the plane on that flight, and had there been anything unairworthy about the plane, he would have advised Captain Word. [R. 675, 685.]

From Honolulu the aircraft was flown to Guam, with a stop at Wake, and then back to Wake. At Wake, Harry Wood, crew chief, checked with the flight engineer as to possible malfunctioning or discrepancies—there were none. [R. 703.] Wood then made a thorough inspection of the aircraft, both inside and out, and examined the aircraft's log. [R. 704-706.] He observed no squawks or

complaints on the log. [R. 706.] The only defect on the aircraft he observed was a worn tire, which would not affect the airworthiness of the plane. [R. 705.] The plane made a normal take-off from Wake. [R. 710.]

Questions Presented.

As to Slick, the basic issues are as follows:

(1) When an aircraft crashes at sea from unknown causes, does *res ipsa loquitur* apply as to a company performing maintenance work on the aircraft, the last work being done several days before the crash, and during which interval servicing was performed by another agency and the aircraft flown many thousands of miles?

(2) Assuming such an inference could be drawn, was the District Court required to give a decision in accordance with it?

(3) Was the finding of the District Court that Slick was not negligent clearly wrong?

Summary of Argument.

Only Points IB and IIIC in Appellants' Opening Brief relate to Appellee Slick. The contentions made under Point IV of Appellants' Brief, relate to Slick only insofar as they claim error with respect to findings against claims made under the points mentioned above.

In this Brief, Slick will show in Point I that *res ipsa loquitur* is not applicable to it in the present case; in Point II that even if it could be held applicable only a permissive inference is created which the District Court could disregard in view of other evidence; and in Point III that the findings made contrary to the evidence selected by Appellants are not clearly wrong.

ARGUMENT.

I.

Res Ipsa Loquitur Is Inapplicable to Appellee Slick.

Slick will not comment extensively upon the applicability under any circumstance of the doctrine of *res ipsa loquitur* to an action under the Death on the High Seas Act, other than to call attention to the remark of Judge Holtzoff in *Smith v. Pennsylvania Cent. Airlines Co.* (D. C. Dist. Col., 1948), 76 Fed. Supp. 940, 943-944, that

“It is true that the doctrine of *res ipsa loquitur* has never been applied to loss of life at sea.”

Although counsel for Appellants has cited several decisions arising under other laws in which the doctrine of *res ipsa loquitur* has been applied as to a *common carrier* in control of the instrumentality at the time of the disaster, no case has been cited which applies the doctrine to a manufacturer or other person maintaining an aircraft when an unexplained crash occurred after the aircraft left the control of such person. The only cases directly considering this question which have come to the attention of counsel refuse to apply the doctrine.

Thus in *McCoy v. Stinson Aircraft Corp.* (1942) U. S. Aviation Reports 154, defendant aircraft company manufactured and sold a plane to the employer of plaintiff's intestate. It was later returned to defendant's factory where a gusset was welded on a wing. Thereafter, the plane was flown for about four months, with the exception of a five-week interval during that period, and crashed. Plaintiff relied upon specific acts of negligence, but in commenting upon the contention that *res ipsa loquitur* was applicable, the Canadian Court stated:

“The plane was in use over a period of months and damage could happen which the defendant corpora-

tion could not possibly know about, could not possibly prove in court, and consequently could not be held responsible for proving. In other words, it is not the sealed bottle element, nor the case in which the underwear undoubtedly remained in the same condition as when it left the factory; . . . How could that principle of responsibility . . . exist where the plane was subjected to constant use, over which the corporation had no control whatever? I think it must be clearly shown that the condition which resulted in the crash was a condition which could not have been introduced by anything which occurred between the delivery of the plane, or between the performing of the welding operation, and the accident, before that principle (with great respect to the argument I have heard) can be applied to a case such as this. The plaintiff falls far short of eliminating possible extraneous causes which might account for the defective condition which undoubtedly brought about the crash." (P. 157.)

Similarly, in *D'Aquilla v. Pryor* (S. D. N. Y., 1954), 122 Fed. Supp. 346, the District Court refused to apply *res ipsa loquitur* in favor of a passenger and against the owner of a rented plane where the evidence showed that it was rented in an airworthy condition.

The testimony of the employees servicing and flying the aircraft after it left the control of Slick as do the operational records, establish that the aircraft was airworthy after leaving Slick's control. Indeed, it would have to be to have negotiated the many thousands of miles it did prior to the crash.

Furthermore, servicing and maintenance was performed upon the aircraft after it left Slick's control. The District Court could properly refuse to draw the inference

or *res ipsa loquitur* in view of such affirmative evidence that others may have changed the condition of the aircraft.

Cf. Danner v. Atkins (1956), 47 Cal. 2d 327, 303 P. 2d 724.

As pointed out in *Zentz v. Coca Cola Bottling Co.* (1952), 39 Cal. 2d 436, 442-443, 247 P. 2d 344, the doctrine of *res ipsa loquitur* ordinarily is based upon probabilities, and is generally applicable when, because of the nature of the accident, it is more probable than not that the particular defendant charged was negligent. The requirements are satisfied when the instrumentality is under the control of such defendant at the time of the accident or if the defect in the instrumentality is of such a nature that it probably was caused by defendant's negligence when the instrumentality was under his control. In the latter instance, however, plaintiff must affirmatively establish that the condition of the instrumentality was not changed after it left defendant's control.

The Court in the *Zentz* case noted [p. 445] an exception in common carrier cases to the general rule that the probability must exist as to negligence of a specific defendant where a passenger is suing the carrier. The doctrine is allowed as against the common carrier, despite possible participation of other persons,

“‘. . . in view of the very high degree of care essential under the law on the part of a carrier of persons toward those who are its passengers, . . .’
(39 Cal. 2d 445.)

It is this same duty of a high degree of care which causes the Courts to apply the doctrine of *res ipsa loquitur* in cases involving air line accidents, which often, such as in the present case, occur in circumstances under which it cannot be truly said the crash *probably* resulted from the negligence of anyone. For that reason, as pointed out by the District Court in *Smith v. Pennsylvania Cent. Airlines Corp.* (1948 D. C. Dist. Col.) 76 Fed. Supp. 940, *res ipsa loquitur* generally is held applicable to a common carrier in an unexplained airplane crash but not as to another person in control of the plane.

It should be an *a fortiori* case when defendant, such as Slick, was not acting as a common carrier, was not in control of the aircraft at the time of the crash, and there is no basis for concluding that the crash *probably* resulted from its negligence.

In all of the cases cited by Appellants for the proposition that *res ipsa loquitur* may be invoked against Slick, either evidence of the specific cause of the accident tended to establish the probability that the particular defendant charged was responsible, or the cases dealt with the unusual malpractice situation where the persons in attendance when plaintiff suffered injury are deemed to be in joint control.

II.

Even if Applicable, Res Ipsa Would Raise Only an Inference of Negligence Which the District Court Could Disregard in the Light of Other Evidence.

As pointed out in *Geotechnical Corp. of Delaware v. Pure Oil Co.* (C. A. 5th, 1952), 196 F. 2d 199:

“ . . . the doctrine as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some courts. . . . The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a *prima facie* case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and when the evidence is all in, the question still is whether all the evidence, in the light of common experience, reasonably shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved.”

In view of the testimony of the aircraft being air-worthy after it left the control of Slick, and the total absence of any evidence of negligence on its part or that the crash probably resulted from its negligence, it is submitted that the District Judge was correct in refusing to draw such an inference.

III.

The Decision of the District Court Was Not Contrary to the Clear Preponderance of the Evidence.

It is, of course, well settled in this circuit that in admiralty the findings and conclusions of the District Judge will not be disturbed on appeal unless error is plain.

The Heranger (C. C. A. 9th, 1939), 101 F. 2d 953, 957.

Appellants list three claimed specific acts of negligence as to Slick. The first is a claimed omitted test flight on the aircraft after replacement of the number four engine. The record shows, however, that a combined test flight and ferry flight was made after installation from Burbank to Oakland. [R. 49]. Such a flight would effect a much better test, being over a longer distance, then would a short hop around the field. Furthermore, it is difficult to establish any causal connection between such claimed omission and the crash. The test flight showed that the engine worked properly, and even if it had not, the plane was fully capable of operating on three engines, as recognized by Appellants on page 47 of their brief.

The second claim is that negligence is established from the auto pilot having 2100 hours on it at the time of the crash, rather than its being changed at 2,000. There is no showing that the unit was working improperly in any manner on the fatal flight, or that it in any way contributed to the crash. Furthermore, there is abundant testimony that in case of malfunctioning, the autopilot is easily disengaged or overpowered, and thus there is ample basis for the conclusion that the accident did not result from any defect in that unit.

The third ground alleged by appellants is that Slick faultily maintained the aircraft over a period of years and hence, apparently, they would infer that it faultily maintained the aircraft on the occasion in question so as to cause the crash. This contention is made after a selection of isolated items appearing on squawk sheets covering a period of a year. Appellants would draw an inference that maintenance was faulty because no records affirmatively showed some of the items were corrected, but it is more reasonable to infer that they were corrected, since the items would have reappeared on the squawk sheets if they were not.

Finally, it is apparent from the testimony of Appellants' own witness that the cause of the crash was not any mechanical difficulty, for Captain William Tracy, called as an expert, clearly testified that usually before an operational malfunction becomes critical, there is some preliminary warning sufficient to enable corrective steps to be taken. [R. 265.] As pointed out in Appellants' Brief (p. 19) the testimony of Appellants' own witnesses tended to show the accident occurred without opportunity to make the usual emergency preparations.

Conclusion.

It is respectfully submitted that the judgment should be affirmed as to Appellee, Slick Airways, Inc.

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No. 15446 (In Admiralty)

IN THE

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FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of
Maria G. Muna, deceased, *et al.*,

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Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

Hon. Thurmond Clarke, Judge.

BRIEF OF APPELLEE TRANSOCEAN AIR LINES, INC., A CORPORATION.

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FILED

SEP 23 1957

PAUL P. GRIFFIN, CLERK

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BRIEF OF APPELLEE TRANSOCEAN AIR LINES, INC., A CORPORATION.

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION.

Appellee Transocean Air Lines, Inc., a corporation,
hereinafter referred to as Transocean, accepts the juris-
dictional statement on pages 1, 2 and 3 of the appellant's
opening brief.

II.

STATEMENT OF THE CASE.

A. The Questions Involved and the Manner in Which They Have Been Raised.

Appellants have set forth five specifications of errors (Op. Br. p. 7), although only two questions on appeal are raised on page 6 of the opening brief, it being claimed that the doctrine of *res ipsa loquitur* applies to a suit in admiralty for the death of a passenger in an airplane crash on the high seas, and that under the evidence in this case the appellants were entitled to a judgment despite the findings of the trial court in favor of the respondent. Actually, there is only one question presented by the specifications of errors and the points on appeal, *i.e.*, was the evidence sufficient to sustain the findings of fact, conclusions of law and judgment in favor of the respondent Transocean.

B. Introduction to Statement of Facts.

The voluminous transcript demonstrates a thorough and substantial conflict in the evidence which is not accurately reflected in appellant's opening brief.¹

One fact is crystal clear. A Transocean airplane with 50 passengers and a crew of 8 persons, including 3 pilots, left the Island of Wake, bound for Honolulu, and disappeared shortly thereafter. Some of the bodies were found, together with small portions of the wrecked air-

¹"Where an appellant claims that some particular issue of fact is not sustained by the evidence, he is required to set forth in his brief all of the material evidence on the point and not merely his own evidence."

Slovick v. James I. Barnes Construction Co. (1956), 142 Cal. App. 2d 618, 622, 298 P. 2d 923.

craft. The record is devoid of evidence indicating the cause of the disaster.

Preliminarily it may be observed that appellants among other things assert that the auto-pilot was improperly maintained, that the pilots were inadequately trained in emergency procedures, and were scheduled to fly an excessive number of hours. There was a conflict of evidence on all these points.

C. Statement of Facts.

1. General Nature of Transocean Operation.

Transocean conducted a large operation, with principal bases in Oakland and Burbank, California, and with bases in Honolulu, Guam and Wake Island, as well as Tokyo and other points in the Orient [p. 44].

In July, 1953, the month of the fateful crash, Transocean maintained facilities at Oakland, where they had 10 electricians, including 4 instrument men, as well as numerous mechanics [pp. 208-209]. They were equipped to make complete changes, work on automatic pilots and to do any other necessary maintenance work.

Facilities at Burbank were maintained by respondent Slick, the latter company being paid \$23,000.00 a month for maintaining the airplane in question [p. 45]. Slick's facilities had been thoroughly investigated and found adequate. Their library contained all the necessary manuals relating to the maintenance of the aircraft [p. 764].

Transocean maintained in addition, bases at Honolulu, where the personnel was approximately 25 persons, at Wake Island, where the personnel was 75 to 80 persons, and at Guam, where the personnel was 15 to 20 persons, in each instance mechanics and other qualified persons

being a part of the personnel capable of making engine changes, tire changes, replacing or working on the automatic pilot, and any other portion of the airplane [p. 726.]

2. The Aircraft.

The aircraft was a Douglas DC-6 purchased from Slick, which was converted by Douglas from a cargo plane to a passenger plane. It was a type of plane customarily used throughout the world for the carriage of passengers and freight.

As a part of normal operating procedure in both Service and commercial flying, it is customary for the pilots to indicate in the ship's log any discrepancies that need correcting. These are termed in the industry. "squawks." *Everything* is put down, whether it is a broken light bulb or something really serious [p. 683].

Appellants particularly complain of the automatic pilot, and cite a history of squawks relating to this particular instrument. Whatever problems may have existed in the past, the evidence is undisputed that on June 2, 1953, the automatic pilot was removed from the plane at Oakland by witness Babb and completely overhauled. Prior to October of 1953 the Civil Aeronautics Authority had not issued a repairman's certificate. As soon as they came out, however, in October, this man received such a certificate. Babb was amply qualified. He had been working on automatic pilots of the same type as were installed in the aircraft in question, since 1947 [p. 202]. He had received training in a trade school, at the Iowa State College for the Navy, had attended the gyro compass school for the Navy, the DC-6 school and the Slick Airways School [p. 197], in addition to a Navy in-

structor's school. He had schooling from a Bendix representative on the auto pilot [p. 198]. On June 2, this witness worked on the auto pilot and overhauled the altitude control unit [p. 239]. He discovered that the autyson rotor bearings were frozen. These bearings were replaced and the system checked and found to be satisfactory. The unit was reinstalled in the airplane and checked in the plane [p. 240]. This particular autyson was standard and was used in many similar instruments and the witness was thoroughly familiar with its overhauling [p. 242]. He tested the altitude control as prescribed in the overhaul manual [p. 242] and subjected it to various tests. He tested the altitude control in the airplane and it worked satisfactorily. He was of the opinion that if there was any other component that was not working, it would have shown up in the operation of the auto-pilot [p. 250]. He checked out the overpowering mechanism and determined that the auto-pilot could be manually overpowered without excessive pressure, and that it did not overpower too easily; in other words, that there was sufficient control [p. 278]. This work was likewise checked out by witness George Shaw, an inspector with Transocean, who had a background of training at Cal Aero Tech and the Navy [p. 322]. It was the witness' opinion that the overhaul which had been done by Babb had corrected any trouble in the instrument [p. 335]. He observed the mechanic put the system through its ground run [p. 338]. *There is no record of any further squawk by any of the pilots with reference to the auto-pilot following the overhaul of June 2.*

During the month of July 1953, the airplane was flown on July 2nd from Oakland to Burbank, on July 4 from Burbank to Oakland, and then to Honolulu. On July 5,

from Honolulu to Wake Island, and then to Tokyo, with a return trip to Wake Island on July 6. On July 6 the plane was flown to Honolulu and then to Oakland, where it arrived on the 7th, after which it was flown to Burbank. On July 8, the plane was flown from Burbank to Oakland and then on July 9 to Honolulu, where on the same day it returned to Burbank. On July 10, the plane was flown from Burbank to Oakland, from Oakland to Honolulu, and on July 11 to Guam and then on July 12 to Wake Island, where, en route to Honolulu, the plane disappeared.

It is significant to note that during the entire month of July, although there were minor squawks of various types with reference to the plane, which were corrected, not only single mention appears of any malfunctioning of the auto-pilot or any of its component parts.

Captain Keating flew the plane during the fore-part of July and had used the automatic pilot and had experienced no difficulty with it [p. 728]. Captain Buckelew, an experienced flier, flew the plane on July 10, 1953, from Oakland to Honolulu, a flight of 10 hours and 5 minutes [p. 675]. He did not recall any difficulty in connection with the operation of the plane on that trip [p. 677]. Buckelew testified that if there had been anything un-airworthy about the craft he would have so stated to Captain Word [p. 685]. There is no evidence to indicate that any of the pilots on the trip from Oakland to Honolulu, from Honolulu to Guam or from Guam to Wake Island, had any problem whatsoever with the automatic pilot. From this evidence alone, the trial court could reasonably conclude that Babb's overhaul had eliminated any problem with the automatic pilot.

3. The Last Flight From Point of Departure at
Oakland on July 10, 1953.

The evidence is uncontradicted that on July 10, 1953, the plane departed from Oakland Airport for Honolulu, the flight being designated as No. 109. This flight was in charge of Captain Buckelew, an experienced pilot and a good friend of Captain Word, the pilot on the fatal flight. Captain Buckelew flew the plane to Honolulu, where it was taken over by Captain Wm. L. Word, First Officer Herbert A. Hudson, Second Officer Leonard H. Nowell, Navigator John Hoy, Flight Engineer George Haaskamp, Student Flight Engineer Paul Yedwabnick, a flight purser and a stewardess. All these persons were well known to Captain Buckelew [pp. 670-672]. In the opinion of the witness, Captain Word and the members of the crew appeared to be fresh. In his opinion at the time the aircraft was turned over to Word, it was in an airworthy condition [p. 685]. This was the crew on duty at the time of the fatal flight.

The evidence was uncontradicted that all three of the pilots were experienced pilots. While the total flying time of none of these men is reflected in the record, it is obvious that even in DC-6 equipment alone, their flying experience had been considerable. Thus, Captain Word had DC-6 flight time of 712 hours; Officer Hudson had 529 hours in DC-6 equipment, and Officer Nowell had 699 hours in DC-6 equipment.

Captain Word was described by one witness as being a very good pilot—conservative, knew his business [p. 677]. Captain Keating testified that Word and Hudson were excellent pilots [p. 732]; that Officer Nowell was a good pilot [p. 736]; that Flight Engineer Haaskamp

was an excellent flight engineer. He was described as being above average.

The flight from Honolulu to Guam was uneventful. Don Carson, the dispatcher at Guam on July 11, actually observed the plane land [p. 629]. The passengers were helped off the aircraft and the witness talked to the crew [p. 632]. The flight logs and the weather were discussed with the members of the crew. No complaints of any kind were made with reference to the functioning of the aircraft.

The crew was in good spirits and none appeared to be ill [p. 634], and none appeared to be suffering from pilot fatigue [p. 634]. The crew was taken in two vehicles to the Transocean headquarters in the mountains. They were fed and after a brief "bull session" the crew broke up and went to bed. The following morning the crew was awakened and driven to the airport. Everyone looked normal and rested and nobody appeared tired [p. 640]. The crew went to the office and the witness was in contact with all members of the crew and observed their physical condition during a period of approximately an hour and a half before the flight. He noticed nothing unusual about their physical condition [p. 641]. He was a very good friend of all members of the crew. The plane was put through a pre-flight check and sounded satisfactory. He observed the take off and noticed nothing unusual about the take off or the attitude of the plane [p. 646].

A short time later the plane landed at Wake Island.

Harry Wood, a mechanic employed by Transocean at Wake Island, and whose duty it was to service and maintain the aircraft, observed the plane land at Wake Island

[p. 699]. He checked immediately with the flight engineer and Captain Word and there were no complaints with reference to the plane [p. 702]. He went over the matter of possible discrepancies with the flight engineer, Haaskamp, and was advised that there was no malfunctioning or discrepancies in the aircraft. In checking the log, Wood did not observe any squawks or complaints other than the left main inboard tire, which showed some signs of wear [pp. 705-706]. The evidence was uncontradicted that a worn tire would have no bearing of any type upon the airworthiness of the plane [p. 705]. The ground checks made of the plane before its departure were satisfactory [p. 709]. He fully and completely checked the airplane before departure [pp. 703-704].

While a good deal of appellants' brief is devoted to a long excursion into the voluminous records relating to the particular plane, going back for a period of days, weeks, months and even years before the accident in question, the fact remains that the plane was constantly serviced by both Slick and Transocean and that the arrival at Guam was *uneventful* as well as the departure from Guam and the arrival at Wake Island. At the time of the departure from Wake Island, the crew appeared to be in good spirits. There is no evidence of any problem on the flight between Guam and Wake Island, nor is there any evidence of any problem developing after the take off at Wake Island, during which time position reports were given on two occasions.

At Wake Island, several of the ground crew were deeply conscious of the departure of this particular plane since it contained at least a dozen members of families departing from the Island, with whom they were thoroughly familiar, as well as the crew, who were good friends

of the witnesses that testified. It is fair to infer that none of the ground crew, faced with the obligation of correcting any known flaws in the plane, would have permitted this particular plane under these circumstances to have departed without taking every possible precaution.

4. Question of So-called Pilot Fatigue.

The crew in question boarded the airplane in Honolulu and flew to Guam where they were taken from the air field in two automobiles to quarters where they were appropriately fed. The uncontradicted evidence is that they had ample rest and opportunity for rest and that the following morning, the day of the fateful flight, they had breakfast, and that at that time they appeared to be rested and there was no evidence of any fatigue [p. 638]. This testimony came from persons who were experienced in the observation of pilots and persons engaged in the flying of aircraft and who would clearly be in a position to know about fatigue and the effects of fatigue on an individual.

5. The Auto-pilot.

Some of the evidence relating to the auto-pilot has already been referred to. There is no evidence indicating that in fact the auto-pilot was in use at the time of the disappearance of the plane. Its use is *optional* with the pilot, who may or may not see fit to use the instrumentality. In any event, the plane had been flown from Honolulu to Guam to Wake Island with no evidence of any problem in connection with the auto-pilot. At the time of the last radio check in, there was no mention of any difficulty with the auto-pilot. Appellees' employees are of course entitled to the presumption that they take ordinary care for their own concerns and that they obey

the law, and it must therefore be presumed that if there had been any difficulty with the auto-pilot as a result of the long flight from Honolulu to Guam, or from Guam to Wake Island, the crew would have called attention of this fact to the ground crew at either Guam or Wake Island, so that the needed repairs could be made. There is no evidence of any such request.

Appellants are lost in a maze of material, which, though interesting, is purely speculative insofar as the particular crash in question was concerned.

It is quite obvious that at the time of the last report, the plane had just reached its cruising altitude. What the pilot did with reference to the auto-pilot at that point is of course pure speculation. The evidence is uncontradicted that in any event there are at least four separate and independent methods by which the pilot or co-pilot could immediately disengage the auto-pilot so that the plane would be operated manually, much the same as an automobile with power steering, where the power steering for some reason failed.

There are at least four methods by which the pilot or co-pilot may disengage the auto-pilot. See testimony of Buckelew [p. 680]; testimony of Keating [pp. 729-730]. Babb testified that there were four ways in which the auto-pilot could be disengaged [p. 287]. There is a switch on the pedestal, a disengaging switch on the pilot's control wheel, a disengaging switch on the co-pilot's control wheel, and the manual disengaging of the servos by the pilot's left hand [p. 289].

If the pilot controls the plane with the auto-pilot disengaged, no malfunctioning of the auto-pilot could in any way effect the operation of the plane [p. 290]. The pilot

can overpower the auto-pilot *at any time* by merely grabbing the controls, which are checked every time the auto-pilot is checked [p. 291]. Babb testified that he had never heard of a pilot's disconnect buttons becoming inoperative [p. 293].

Tracy, the appellants' expert witness, testified that if there was any malfunctioning of the auto-pilot [p. 268] there would in all reasonable probability be some indication of that fact to the pilot [pp. 268-269]. He testified that:

"At any time there is any indication of any whatsoever malfunctioning about the auto gyro it *can be taken over and handled manually by the pilot or the co-pilot*" [p. 271, lines 12-15].

6. Provision for Rest Facilities.

Appellants make a number of claims with respect of provision of rest facilities. The evidence relating to the facilities at the Island of Guam has already been set forth in great detail. Appellants assert that there should have been more than one bunk on this aircraft. Their own witness, Tracy, admitted that with three pilots the usual practice would be for one member to rest and the other two pilots operate the plane [p. 274, lines 6-15]. The evidence is undisputed that there was such a bunk for the pilot.

It is also asserted that it would have been good practice to change crews at Wake Island (Op. Br. p. 10). The evidence from Captain Keating was that where there was a two pilot crew, the crew would be changed at Wake Island, but that if it were a multiple crew, they would not change. The answer is obvious. With a multiple crew, the pilots can rotate a rest period in the bunk provided for that purpose [p. 756].

Preliminary Observations Relating to the Power of the Appellate Court in Admiralty Cases.

While it is contended by appellants that they are entitled to a trial *de novo* upon the evidence, this proposition has been recently rejected by the Supreme Court in the case of *McAllister v. United States*, 348 U. S. 19, at page 20:

“The first question presented is whether the Court of Appeals in reviewing the District Court’s findings, applied proper standards. In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the Appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure. *Boston Insurance Co. v. Dehydrating Process Co.*, 204 F. 2d 441, 444 (C. A. 1st Cir.); *C. J. Dick Towing Co. v. The Leo*, 202 F. 2d 850, 854 (C. A. 5th Cir.); *Union Carbide and Carbon Corp. v. United States*, 200 F. 2d 908, 910 (C. A. 2d Cir.); *Koehler v. United States*, 187 F. 2d 933, 936 (C. A. 7th Cir.); *Walter G. Houghland, Inc. v. Muscovalley*, 184 F. 2d 530, 531 (C. A. 6th Cir.), cert. denied, 340 U. S. 935; *Petterson Lighterage and Towing Corp. v. N. Y. Central R. Co.*, 126 F. 2d 992, 994-995 (C. A. 2d Cir.).”

See also:

United States Lines Co. v. Cummings (9th Cir.),
195 F. 2d 221, 223;

City of Portland v. Luckenback Steamship Co.,
217 F. 2d 894, 897.²

²As the court stated in the *City of Portland v. Luckenback* case at page 897: “Portland’s two experts look fine on paper. Maybe they didn’t look so good to the trial judge as he saw them in the witness box.”

ARGUMENT.

I.

The Trial Court Committed No Error in Connection With the Application of the Doctrine of *Res Ipsa Loquitur*.

The appellants basically present two questions on appeal. (Op. Br. p. 6.) It is the contention of the appellants that the trial court erred in failing to apply the doctrine of *res ipsa loquitur*. Although at one stage of the case, appellants' counsel asked the court whether or not in its opinion the doctrine of *res ipsa loquitur* applied, and the court at that time stated that he did not think so [p. 90], there is nothing in the record to indicate that the trial court did not in fact at the *conclusion* of all of the evidence, apply the doctrine of *res ipsa loquitur*.³

That this is clear is indicated from the notice of motion filed by appellants to include in the record a statement of decision, and wherein the appellants sought after the determination of the case upon the merits, a statement by the court with reference to whether or not the court had applied *res ipsa loquitur*.

³The actual remarks of the court were as follows:

"The Court: I said that if I ruled on that, it would shorten the case, and I said I felt it didn't apply, so we will proceed with the trial.

Mr. Blackman: Is the question of the applicability of *res ipsa loquitur* still open for consideration at a later date?

The Court: Yes, certainly.

Mr. Blackman: I see." [p. 90].

Appellants counsel fully argued *res ipsa loquitur* in both his arguments to the court, see particularly the closing argument [pp. 882-888], wherein counsel cited a New York case relating to the application of the doctrine [p. 888] and handed the volume to the court [p. 919]. The record shows that at the time of the submission of the case the court retained this volume of the New York Reports [p. 919].

In support of that motion, the appellants filed a memorandum of points and authorities [Tr. p. 55, Vol. I] where they themselves recognized the problem. Appellants stated at that time:

“For if they were refused the doctrine in the trial court, but without any record to show it, the Appellate Court will assume that they received the benefit of the doctrine in the trial court. Accordingly, the question of its applicability will never be finally passed upon by appeal.”

There is a dearth of authority relating to the question of the applicability of the doctrine of *res ipsa loquitur* in admiralty cases. In at least one case, *Smith v. Penna. Central Air Lines*, 76 Fed. Supp. 940, the court stated:

“It is true that the doctrine of *res ipsa loquitur* has never been applied to loss of life at sea. The reason for this difference in the law is not found in any distinction of principle, but is of a purely historical nature. The liability of common carriers for loss of life and personal injuries on the high seas is governed by the law of admiralty and not by the common law. These two systems of jurisprudence had varying origins and developed along different lines. Maritime law has always been solicitous of the interests of ship owners, as one of its purposes has been to encourage the building up of the merchant marine.

“Consequently, the liability of ship owners to their passengers and members of their crews has been very much circumscribed not only in respect to the right of recovery, but also in respect to the amount that may be recovered.”

Other cases have indicated that the doctrine of *res ipsa loquitur* may be applied to admiralty, but that the doctrine is of less potency than is to be found in other courts.

Particularly would this be true with reference to California, where the doctrine has perhaps achieved its maximum recognition and force in the 48 states. The District Court sitting as a court in admiralty, however, was not required as it would have been in a civil case, to follow the extremely broad and liberal doctrine of *res ipsa loquitur* as enunciated by the California decisions. That there is a difference between admiralty and the law side of the court is well set forth by Judge Mathes in the case of *Kunkel v. United States*, 140 Fed. Supp. 594, where the court states:

“Against the contention that the difference between the law side and the admiralty side of the court is of no material consequence, that the difference between an action at law and a suit in admiralty is but a mere technicality, stands the rejoinder of the venerated law professor that the distinction may be so considered, if one can consider the difference between a boy and a girl to be but a mere technicality.”

The rule is well set forth in the case of *George Technical Corporation of Delaware v. Pure Oil Company*, 196 F. 2d 199 at 205.

“But the doctrine as expounded by the Supreme Court, and to be applied in admiralty, has less potency than is given it in some other courts. It suffices to cite three recent cases: *Sweeney v. Erving*, 228 U. S. 233, 33 S. Ct. 416, 57 L. Ed. 815; *Jesionowski v. Boston & Maine R. R.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. Ed. 416; *Johnson v. United States*, 333 U. S. 46, 68 S. Ct., 391, 92 L. Ed. 468, the last a suit in admiralty. The effect of them is to hold that the doctrine is not a rule of law, but a principle of evidence, useful to aid in making a *prima facie* case, but that it does not change ultimately the burden of proof on the plaintiff to show negligence in the defendant; and

when the evidence is all in, the question still is whether all the evidence, in the light of common experience, reasonably shows that the defendant was negligent in some respect that caused the injury, though the particular negligence cannot be pointed out or directly proved."

There has been considerable conflict in the reported cases with reference to the applicability of the doctrine of *res ipsa loquitur* to aircraft in any event. See for example:

Wilson v. Colonial Air Transport (Mass.), 180 N. E. 212;

Herndon v. Gregory (Ark), 81 S. W. 2d 244;

Smith v. Whitley (N. C.), 27 S. E. 2d 442;

Boulineaux v. City of Knoxville (Tenn. App.), 99 S. W. 2. 557;

Budgett v. Soo Sky Ways (S. D.), 266 S. W. 2d 53;

Deojay v. Lyford (Me.), 29 A. 2d 11;

Towle v. Phillips (Tenn.), 172 S. W. 2d 806;

Cudney v. Mid-Continent Air Line (Mo.), 254 S. W. 2d 662.

Even assuming that the doctrine applied, it does not relieve the appellant, as the Supreme Court of the United States has pointed out, of the burden of establishing negligence. The rules relating to the obligation of the defendant in cases where the doctrine of *res ipsa loquitur* may properly be said to be applied, vary from state to state, and from jurisdiction to jurisdiction. There can be no question but that with the watered down version of the rule of *res ipsa loquitur* as applied in admiralty, the defendant cannot be charged with the burden of explaining the cause of the accident or catastrophe.

Obviously there were no eye witnesses to the accident, and since not enough of the debris was discovered to make an intelligent inspection of the remaining portions of the plane, it was impossible for the defendant to establish the actual cause of the accident. It would be possible to speculate and to envision countless reasons for the strange disappearance of the craft. Appellants are speculating that *perhaps* the airplane may have been on auto-pilot; that *perhaps* something went wrong with the auto-pilot which the three pilots were unable to control despite the availability of four separate and distinct methods for disengaging the auto-pilot; that *perhaps* the crew was so fatigued that every one of the crew suddenly and inexplicably lost the ability at the same moment to respond to external stimuli; that *perhaps* some emergency was presented which in some fashion could have been averted if one of the members of the crew had gone to all of the ground school courses on emergency training instead of taking part of his course in the manner described in the transcript; that *perhaps* there was something about the pre-flight check when the plane departed from Guam that may have contributed to something which caused the plane to suddenly crash.

Appellants would have us speculate and believe that under no circumstances was there any evidence of sabotage or explosion, merely because on 14 of the bodies unidentified, there appeared to be, according to an autopsy surgeon, no evidence of explosive forces. There is nothing to indicate what happened to the other members of the group of 58 persons aboard, nor in what condition their bodies actually were at the time they hit the water. Appellants would like to speculate and assume that the plane crashed in an almost vertical position. Experiences with aircraft are strange and unusual. It is common knowledge

for example, that any number of crashes have occurred by reason of peculiar circumstances. Thus, in a recent case, a man was convicted of planting dynamite on board a plane, where his mother was a passenger, so that he might collect the insurance. If this plane had landed at sea instead of on the land, where the pieces of the plane might be surveyed and inspected, it could well be that the loss of the plane would forever be a mystery. It is common knowledge that recently in Southern California, and fortunately for the other passengers, a man sealed himself in the lavatory of a plane and apparently exploded some type of charge which blew him out of the plane. The damage was such that there was no explosion inside the plane and the pilots were able to successfully bring the plane to the ground. In other cases it is common knowledge that aircraft have disappeared without apparent cause. Sudden tropical storms, lightning, small foreign aircraft, guided missiles, flying saucers, crazed passengers, a sudden fire in a cockpit, or explosion in the cockpit which would not affect the bodies in the plane, and unrelated to any negligent conduct on the part of the aircraft owners or operators, are possible illustrations of causative factors.

It would be possible to conjecture endlessly on the possibilities inherent in this situation. Such resorts to fancy, however, cannot solve the problem.

Even assuming that *res ipsa loquitur* was properly applicable, the trial court was clearly entitled to apply the presumption of due care on the part of the airmen.⁵ This would eliminate any charge of negligence on the part of

⁵*United States v. Fotopulos*, 180 F. 2d 631 (9th C. C. A.).
Orbach v. Zern, 138 Cal. App. 2d 178.

the crew. Even appellants' witness Tracy testified that usually there is a period of preliminary warning involved before any operational malfunction would become critical [p. 285]. It would be presumed that during such period the crew exercised ordinary care; yet no radio communication was received. Where the inference of negligence is opposed to the presumption of due care it becomes a question of fact for the trial court as to which should be followed.

Scott v. Burke, 39 Cal. 2d 388; 247 P. 2d 313.

Appellee Transocean would likewise be entitled to the benefit of the presumption that their employees, the crewmen, had in fact exercised ordinary care for their own concerns.

Appellants contend that the pilots and other members of the crew were inadequately trained in emergency procedures. They cite in support of this proposition the fact that several members of the crew had missed one or two sessions during the course which was given by Slick for the benefit of all personnel.

Whether the failure of the particular pilot or crew members to attend a given class had any significance insofar as negligence or causal connection was concerned, was a question of fact for the trial court. There was a conflict in the evidence in any event, since there was evidence that Captain Keating had given a review course to co-pilot Hudson of some 14 hours on a trip to Honolulu, as well as at the crew house in Honolulu [pp. 150-151]. Captain Keating personally gave instruction to Officer Hudson on

emergency procedures and it was his opinion that the man was a good pilot. McLain also gave co-pilot Hudson additional instruction on June 17, and 18, 1953, including emergency procedures [pp. 162-163].

Captain Keating further testified that Captain Word was an excellent pilot, fully acquainted with emergency procedures [pp. 732; 748].

Irrespective of whether Word had attended all the classes on emergency procedures, Captain Keating, who was in charge of the entire operation, had personally given Captain Word instructions on emergency procedures and had watched him perform these emergency procedures under simulated emergencies [p. 748], such as fires, fire control and engine out procedures [p. 749]. In addition, there were proficiency checks given approximately every six months.

The witness Buckelew likewise testified that he was well acquainted with Captain Word and that Word was thoroughly trained in emergency procedures [pp. 669-670].

It is well settled that before one can recover damages, he must establish by a preponderance of the evidence that defendant's negligence was the proximate cause of the injuries.

Nuber v. Royal Realty Co., 86 Cal. App. 2d 596;
195 P. 2d 501.

It is Hornbook law that proximate cause is a question for the trier of fact.

II.

There Is No Merit to the Suggestion That the District Court Erred in Making Certain Findings of Fact.

Rule 18.2 (d) of the Federal Admiralty Rules provides as follows: "In all cases when findings are specified as error, the specifications shall state as particularly as may be, wherein the findings of fact and conclusions of law are claimed to be error." Appellants have utterly failed to comply with this requirement of the rules and in any event have not shown how or in what respect any of the findings which are referred to on pages 50, 51 and 52 of the opening brief, even if unsupported by a preponderance of the evidence, could possibly bring about a reversal of the cause.

Appellants contentions with respect to the findings are without substantial merit.

Finding No. XIV is criticized, wherein it was found that no maintenance work was performed at Guam or Wake Island because none was required or necessary. This finding is supported by ample evidence from the witnesses who were produced from both Guam and Wake Island, indicating that other than a worn tire on one of the wheels, which could have no possible bearing on flight, there were no complaints of any kind or character with reference to the aircraft. The court could fairly infer from the evidence that the ground crews at Wake Island and Guam had conducted such inspections as are customary at those bases. The court could fairly infer that no repairs were necessary since no squawks of any kind were made by any member of the crew and that if there had been anything wrong with the plane, some type of complaint would have been made.

Finding No. XVIII is criticized. This finding relates to the take-off from Wake Island, at which time the total gross weight of the aircraft was found to be 94,397 pounds. No complaint is made of that portion of the finding. Obviously the remainder of the finding relating to the distribution of the load and the fact that it was within the allowable gross take off weight of 100,000 pounds, would amount to nothing more than surplusage in any event. Appellants do not contend in their brief that the plane was in any manner overloaded or that the load was not in fact properly distributed. It is well settled that findings on immaterial matters are to be disregarded.

Appellants complain of Finding No. XXI, wherein it was found that no primary structure of the aircraft was recovered and that therefore it was not possible to determine if a structural or mechanical failure of the aircraft occurred in flight.

It is submitted that this is a fair inference from the evidence. It is customary after aircraft accidents, to pick up the pieces as it were, and attempt to reconstruct them or analyze them, to the end that the cause of the crash may be ascertained if possible. Obviously, where no portion of the craft was discovered which would have shed any light upon structural or mechanical failure, it would be impossible to make any determination with reference to structural or mechanical failure.

Appellants complain of Finding No. XXII relating to the maintenance record of the aircraft. Basically this finding is true and accurate. The voluminous maintenance records introduced in evidence on this plane demonstrate every attempt to comply with standard procedures. Irrespective of the maintenance records, however, it is submitted that more crucial is the problem of the actual condi-

tion of the aircraft on its final flight from Oakland to its point of disappearance. The evidence amply demonstrates that the airplane was airworthy at all times during the final flight.

Finding No. XXV is attacked relating to rest periods. The evidence respecting this subject matter has been fully covered in this brief. There was ample evidence to support the trial court's conclusion that the crew had rested adequately and was in a proper state of health to continue with its duties and that there were adequate facilities for rest in flight.

Finding No. XXVI is attacked. The attack is purely carping. The witness Wood testified that the crew did not appear to be suffering from fatigue, illness, worry or disability of any nature. He was thoroughly familiar with the crew members as well as some of the passengers on board the fatal flight.

Finding No. XXVII is complained of, wherein it was stated that whatever occurred to cause the crash apparently occurred without giving any warning or opportunity for corrective action on the part of the crew. The evidence demonstrated that if the auto-pilot developed any malfunctioning, there would usually be sufficient time for the pilot or co-pilot to take such action as was indicated to disengage the auto-pilot and manually take over. Actually the finding is qualified by the word "apparently." The court could do nothing other than make a finding of this type, since obviously that was the only reasonable inference that the court could draw. Since the crew members were clothed with the presumption that they had exercised due care for their own concerns, it must be presumed that if they had opportunity to take corrective action, they would have done so. The fact that there was

no radio message would indicate that there was no opportunity for warning or other corrective action.

Finding No. XXVIII is attacked with reference to the probable cause of the accident being undetermined. This finding like the others is supported by ample evidence. Appellants, as in all of their complaints with reference to the findings, insist that this court re-try the case and take a view of the conflicting evidence which supports appellants' position. The trial court, based upon ample evidence, concluded that the cause of the accident could not be determined and that appellee was not negligent.

Finding XXIX is attacked relating to the qualification of the crew members and the training program of Transocean. The testimony of Captain Keating and Captain Buckelew demonstrates that this particular crew was well qualified and experienced. The evidence is uncontradicted that Transocean maintained a training program, and while there were discrepancies in the testimony relating to the periodic checks, the court could reasonably find that the training program was adequate and intended to keep the crew members on a high degree of proficiency.

The remainder of the findings complained of, Nos. XXX, XXXI, XXXIII, XXXV, XXXVI and XXXVII, all relate to similar matters where there was ample evidence to support the conclusion that Transocean was not negligent and that the airplane in fact was airworthy.

The basic issue to be determined by the trial court was the issue of fault, if any, on the part of appellee Transocean. It is well settled that it is only necessary to find on the ultimate facts, and it is not necessary to expressly find on the probative facts.

Rahlves and Rahlves, Inc. v. Ambort, 118 Cal. App. 2d 465.

Findings on immaterial facts, whether erroneous or otherwise, should be disregarded. No judgment should be reversed except for prejudicial error.

Federal Rules of Civil Procedure, Rule 61;

Drybrough v. Ware, 111 F. 2d 548;

Santa v. Nehi Corp., 171 F. 2d 696.

III.

There Was No Error in Failing to Make Findings of Fact and Conclusions of Law Relating to the Claims for Loss of Baggage and a Refund for the Fares Paid.

This action was commenced under the "Death on the High Seas" Act, 46 U. S. C. A. 761, *et seq.* Section 762 of that Act provides:

"The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . ."

Appellants have cited no responsible authority for their position with respect of the baggage, and the statute obviously was never intended to furnish recovery for such items of loss. The statute is solely a death statute and the damages are for the wrongful death and not for the loss of baggage. The pecuniary loss is that which is sustained by the persons for whose benefit the suit is brought. Obviously the pecuniary loss, if any, with respect of the baggage and the tickets was not sustained by the appellants herein. It is well settled that funeral expenses, for example, cannot be recovered under this Act since no pecuniary loss has been sustained by the person for whose benefit the suit is brought.

See:

The Culbertsons, 61 F. 2d 194.

Conclusion.

It is respectfully submitted that the judgment of the trial court should be affirmed. Whether *res ipsa loquitur* applied or not, the simple fact is that the ultimate burden of proving negligence rested upon the appellants. The trial court on an abundance of evidence has found that the plane was in an airworthy condition and that the appellee was not negligent in connection with the operation or maintenance of the aircraft.

Respectfully submitted,

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Attorneys for Appellee.

No. 15446
(In Admiralty)

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria
G. Muna, Deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Appeal From the United States District Court for the
Southern District of California, Central Division. Hon.
Thurmond Clarke, Judge.

Answer to Petition for Rehearing on Behalf of Re-
spondent Transocean Air Lines, Inc., a Corpora-
tion.

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FILED

JUN 23 1958

PAUL P. O'BRIEN, CLERK

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No. 15446
(In Admiralty)
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH M. TRIHEY, Administrator of the Estate of Maria
G. Muna, Deceased, *et al.*,

Appellants,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Appeal From the United States District Court for the
Southern District of California, Central Division. Hon.
Thurmond Clarke, Judge.

Answer to Petition for Rehearing on Behalf of Re-
spondent Transocean Air Lines, Inc., a Corpora-
tion.

I.

There Is No Merit to the Suggestion That This Court
Has Failed to Apply the Applicable Law Relating
to the Doctrine of Res Ipsa Loquitur.

Preliminarily Respondent wishes to point out that Peti-
tioner again relies heavily on *Desmarias v. Beckman*,
98 F. 2d 550. While this court stated in its opinion that
he *Desmarias* case was in admiralty, a check of the file
ctually reveals that the action was commenced under the

Alaska Territorial Wrongful Death Act and therefore must have been brought on the law side of the court and not in admiralty.¹

The complaint in the companion case, *Haasman v. Pacific Alaska Air Express*, 100 Fed. Supp. 1, sought \$15,000.00 damages and \$3,000.00 attorney's fees. This was in accordance with the Alaska Wrongful Death Act (Sec. 61-7-3 of the Alaska Compiled Laws Annotated), which provides that for damages for wrongful death, the recovery shall not exceed \$15,000.00. A provision in the statute is also made for reasonable attorney's fees. In view of the fact that there is not one word in the entire official transcript of record or in the briefs to indicate that suit was brought under the Death On The High Seas Act, it is apparent, in the face of the amount of the prayer and the prayer for attorney's fees, that the suit was actually brought under the state laws.

Petitioners' position apparently is that there is a distinction between the procedural effect of the application of *res ipsa loquitur* in a carrier case as distinguished from other types of cases.

Several early carrier cases are cited by Petitioners, including *Gleeson v. Virginia Midland Railroad*, 140 U. S. 435, 35 L. Ed. 458, 11 S. Ct. 859. Petitioners cite only a portion of the decision, omitting the following particularly pertinent language at 444, where the court states:

"The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If the accident was in fact the

¹The *Desmarias v. Beckman* appeal is No. 13176, in the possession of the Clerk of this Court in San Francisco.

result of causes beyond the defendant's responsibility, or the act of God, it is still none the less true that the plaintiff has made out a *prima facie* case. When he proves the occurrence of the accident, the defendant must answer the case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense, and it is for the jury to say, in the light of all the testimony and under the instructions of the court, whether the relationship of cause and effect did exist as claimed by the defense between the accident and the alleged exonerating circumstances."

Dean William L. Prosser, in a very illuminating article on the procedural effect of *res ipsa loquitur*, (20 Minn. L. Rev. p. 241) points out that although some of the earlier cases apparently made a distinction between carrier and noncarrier cases, *that such distinction no longer exists*.²

The rule in the federal courts was finally crystallized in *Sweeney v. Erving*, 228 U. S. 233, which was cited with approval by this court.

It is interesting to note that the Supreme Court thereafter affirmed the rule of the Sweeney case in a carrier case, *C. and O. Ry. Co. v. Thompson Mfg. Co.*, 270 U. S. 416. In that case, the shipper brought an action to recover from the carrier for damage to an interstate shipment of goods. The Court cites with approval the holding of the Sweeney case, *supra*, and states as follows, at pages 422, 423:

"The respondent therefore had the burden of proving the carrier's negligence as one of the facts

²See Appendix.

essential to recovery. When he introduced evidence to show delivery of the shipment to the carrier in good condition and its delivery to the consignee in bad condition, the *petitioner* became subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of negligence. *Miles v. International Hotel Co.*, 289 Ill. 320; *Miller v. Miloslawsky*, 153 Ia. 135; *Dinsmore v. Abbott*, 89 Me. 373; *Railroad Co. v. Hughes*, 94 Miss. 242, 246; *Hildebrand v. Carroll*, 106 Wis. 324. The effect of the respondent's evidence was, we think, to make a *prima facie* case for the jury. See *Sweeney v. Erving*, 228 U. S. 233; *Haines v. Shapiro*, 168 N. C. 34, 35; *Sims v. Roy*, 4 App. D. C. 496, 499. But even if this '*prima facie* case' be regarded as sufficient, in the absence of rebutting evidence, to entitle the plaintiff to a verdict (*Bushwell v. Fuller*, 89 Me. 600, 602, 603; *Cogdell v. Railroad*, 132 N. C. 852), the trial court erred here in deciding the issue of negligence in favor of the plaintiff *as a matter of law*. For the petitioner introduced evidence of the condition of the cars from the time of shipment to the time of arrival, which persuasively intended to exclude the possibility of negligence."

Other carrier cases have consistently applied the rule of the *Sweeney* case:

Robertson v. Washington Ry. & Elect. Co., 279 Fed. 180, at 184;

Underwood v. Capital Transit Co., 183 F. 2d 824;

Capital Transit Co. v. Jackson, 149 Fed. 439.

Dean Prosser states that there seems to be no single question as to the procedural effect of *res ipsa loquitur* on which statements may not be found, in the opinions, on either side. (See Minn. L. Rev. p. 257.)

Confusion in the decisions has been largely due to a failure to recognize the distinction between the method in which the problem has been raised. Thus the defendant may move for a non-suit or directed verdict, claiming that as a matter of law, even if the inference is properly drawn, that there is no case.

We are not confronted with such decisions in the case at bar, since the trial court had all of the evidence before it and the true rule was as is stated in *Sweeney v. Erving*, 228 U. S. 233, *supra*, that the effect of the *entire evidence* is to be determined by the trier of fact.

A succinct statement of the rule may be found in 9 Cal. Jur. 2d 758, where it is stated:

“Rebuttal of the presumption need not be made by a preponderance of the evidence and where cases speak of defendant’s ‘burden of proof’, to meet the *prima facie* case established by the presumption, they do not mean the production of a preponderance of evidence. In other words, the normal distribution of the burden of proof between a plaintiff and a defendant in a negligence case is not reversed by the application of the doctrine of *res ipsa loquitur* . . . Plaintiff must still prove his case by a preponderance of the evidence.” (Emphasis added.)

II.

The Ultimate Burden of Proof Remained With Petitioner. It Was for the Trial Court to Determine From All of the Evidence Whether Petitioner Had Sustained His Burden of Proof.

Assuming that the doctrine of *res ipsa loquitur* applies in admiralty, the fact remains that the ultimate burden of proof nevertheless rests upon the plaintiff. As opposed to any inference of negligence which might be created by the doctrine of *res ipsa loquitur*, the trial court had the evidence introduced by the defendant, together with inferences which might be drawn from evidence introduced by the plaintiff, together with the presumption that the pilots had exercised ordinary care for their own concerns and obeyed the law.

The matter of weighing an inference of negligence against the evidence of the defendant is sometimes an extremely difficult task. Prosser has said that, "An inference can no more be balanced against evidence than ten pounds of sugar can be weighed against half past 2:00 in the afternoon."

However difficult the problem may have been, the task of weighing all the evidence, inferences and presumptions, and otherwise, rested with the trial court in a case where conflicting inferences and conclusions may be drawn.

Petitioners' position, when finally analyzed, amounts to an assertion that despite the showing of the Respondent, the petitioner was entitled as a matter of law to a judgment in their favor. As the court states in *Ireland v. Marsden*, 108 Cal. App. 632, at 642:

"When all the evidence is in, the question for the jury (or trier of fact) is *whether the preponderance is with the plaintiff.*" (Material in parentheses added.)

Petitioners' concept of the doctrine of *res ipsa loquitur* as an arbitrary rule of law entitling them to a judgment, is not warranted by the federal cases or by the authorities in general.

In *Siebrand v. Gosnell*, 234 F. 2d 81, at 87, the court states:

"Res ipsa loquitur is not some 'exotic doctrine.' It is nothing more than a case of circumstantial evidence where plaintiff has proved enough to get to the jury."

See:

F. Texas and Pac. Ry. Co. v. Buckles, 195 F. 2d 64.

In *Capital Transport Company v. Jackson*, a carrier case, 149 F. 2d 839 at 841, the court states:

"It (res ipsa loquitur) permits an inference of negligence and thus establishes a prima facie case; in other words, makes a case for the jury."

In *Hufford v. Cicovich* (Wash), 290 P. 2d 709, at 711, the court cites the *Sweeney* case, *supra*, with approval, and states:

". . . There is no magic in the phrase 'res ipsa loquitur'. It means simply that the facts and circumstances warrant an inference of negligence, not that they compel it; that they furnish circumstantial evidence of negligence where direct evidence is lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient. Application of the doctrine carries plaintiff past a non-suit, and makes a case to be decided by the trier of facts, but it does not compel a decision favorable to the plaintiffs. . . ."

That respondent offered no evidence as to the cause of the crash is conceded. Neither Petitioners nor Respondent know the cause of the crash. Under these circumstances, to assert that the burden is upon Respondent to explain the cause of the accident is to require of Respondent an impossibility.

“The law never requires impossibilities.”

See:

Maxims of Jurisprudence, California Civil Code
3531.

Even assuming that an inference of negligence arises from the disappearance of the plane, all that defendant could do was to introduce evidence opposed to the inferences of negligence and to the evidence produced by plaintiff and any inferences which might reasonably be drawn therefrom. Respondent produced such evidence and no useful purpose would be served by reiterating that evidence in this answer.

Petitioner again asserts that the trial court did not in fact apply the doctrine, although it was applicable. This defendant has more than sufficiently answered petitioners' suggestions in this respect. Petitioners are quibbling with language when they lay stress upon the statement of the court, wherein the discussion of *res ipsa loquitur* was referred to as a “ruling”. Irrespective of this, it is obvious that the court kept the matter open for consideration and did in fact receive argument and authorities on the subject matter of *res ipsa loquitur* at a later date, as this court has pointed out.

Under these circumstances there is no reason to assume that the trial court did not in fact apply the doctrine which affords at best merely an inference, and upon

weighing it against the conflicting testimony and presumptions, found the inference wanting, and that Petitioners had failed to establish their ultimate burden of proof.

It is submitted that this Court correctly decided the matter and that there is no basis shown for the granting of a rehearing.

Respectfully submitted,

CRIDER, TILSON & RUPPE, and
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Attorneys for Appellee and Respondent.

APPENDIX.

PROSSER: PROCEDURAL EFFECT OF RES IPSA LOQUITUR.
(20 Minn. Law. Rev., pp. 260, 261.)

In the simplest *res ipsa loquitur* case, there is only a permissible inference of negligence. It is significant that many of the jurisdictions which give the doctrine greater effect have been compelled to recognize, under other names, the existence of a type of *res ipsa* case where there is no more than an inference. The source of the presumption idea is not difficult to trace. It rests largely upon the feeling that all the evidence must be in the possession of defendant, and he should be called upon to explain, under penalty of a decision against him. But it never has been a sufficient defense in a *res ipsa* case that the defendant has no evidence, and knows no more about the cause of the accident than the plaintiff; and *there is no policy of the law in favor of permitting a party who has the burden of proof in the first instance to obtain a directed verdict merely by a showing that he knows less about the facts than his adversary.* *Galbraith v. Busch* (1935), 267 N. Y. 230, 196 N. E. 36. Another explanation lies in the fact that many of the early cases were actions by passengers against carriers, and, by analogy to the cases of damage to goods, it was considered that plaintiff had established his case by proving breach of the contract of safe transportation, and defendant thereafter had the affirmative of the issue as to his own due care. *This point of view has merged and become lost in the general 'doctrine' of res ipsa loquitur,* and carrier cases now are treated like others¹ but it has left its mark in many states. (Emphasis added.)

¹Dobie, Bailments and Carriers, sec. 188, p. 608; 4 Elliott, Railroads, Sec. 1644, p. 573; 3 Moore, Carriers, 2d Ed., p. 1477; 3

If the thing speaks for itself, if the inference is sufficiently strong to induce the court to say that it may be drawn, why permit a perverse jury to *refuse* to draw it? If the obvious conclusion from the circumstances is that defendant has been negligent, why not direct a verdict for the plaintiff?

The answer is, that in the usual *res ipsa* case the inference of negligence is not exclusive, nor is it so strong that we may say as a matter of law that the jury could not reject it. *If the defendant's elevator falls while the plaintiff is riding in it, it may be inferred that there has been negligent construction, failure to inspect, negligent operation. But it may also be inferred that there was a defective cable which could not have been discovered by all reasonable care, or that some unavoidable accident has happened to the machinery. Whether one inference is more reasonable than the other is a question which cannot be determined as a matter of law, and must be left to the jury.*²

Hutchinson, Carriers, 3d Ed., Secs. 1413, 1414, pp. 1700 ff. But see *Gordon v. Huehling Packing Co.* (1931), 328 Mo. 123, 40 S. W. 2d 693; *Hartnett v. May Dept. Stores* (Mo. App. 1935), 85 S. W. 2d 644, to the effect that carrier cases involve a presumption, other *res ipsa* cases a mere inference. *Sweeney v. Erving*, 228 U. S. 233; *Central R. R. of N. J. v. Peluso*, 286 Fed. 661 (C. C. A. 28); *Atlas Powder Co. v. Benson*, 287 Fed. 797 (3rd C. C. A.); *Dierks Lbr. Co. v. Brown*, 19 Fed. 2d 732 (8th C. C. A.); *Cochran v. P. Hasburgh & L. E. R. R. Co.*, 31 F. 2d 769; *Blantor v. Great Atl. and Pac. Tea Co.* (C. C. A. 5).

²" . . . but that inference is still one for the jury and not for the court. They may not believe the witnesses; *the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do*; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant." *Swayze, J., in Hughes v. Atlantic City & S. R. R.* (1914), 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927.

No. 15454

In the
United States Court of Appeals
For the Ninth Circuit

PACIFIC CAGE AND SCREEN CO.,
a corporation; PET DEALERS SUP-
PLY COMPANY, a corporation;
MERCHANTS PET SUPPLY COM-
PANY, a corporation; and JOHN
MIDDELKOOP,

Appellants,

vs.

CONTINENTAL CAGE CORPORA-
TION, a corporation,

Appellee.

Appellants' Opening Brief

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FILED

JUL 19 1957

PAUL P. O'BRYEN, CLERK

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In the
United States Court of Appeals
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PACIFIC CAGE AND SCREEN CO.,
a corporation; PET DEALERS SUP-
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MERCHANTS PET SUPPLY COM-
PANY, a corporation; and JOHN
MIDDELKOOP,

Appellants,

vs.

CONTINENTAL CAGE CORPORA-
TION, a corporation,

Appellee.

No. 15454

Appellants' Opening Brief

This is an appeal by the defendants below from the interlocutory order of the United States District Court for the Southern District of California, Central Division, granting a preliminary injunction [R. 51, 74] in an action for the infringement of U. S. Letters Patent No. Des. 177,326 [R. 97].

JURISDICTION

Original jurisdiction is vested in the District Court by 28 U.S.C. 1338(a) and 1400(b), and jurisdiction to review the appealed interlocutory order is vested in this Court by 28 U.S.C. 1292(1). The order was made July 31, 1956 [R. 21] and after timely motion for new trial on August 10, 1956, [R. 60], the order was adhered to on September 13, 1956 [R. 74]. Notice of Appeal was filed October 2, 1956 [R. 83], within the prescribed period for appeal.

STATEMENT OF CASE

Appellee (who was plaintiff below and is hereinafter referred to as plaintiff), charged appellants (who were defendants below and are hereinafter referred to as defendants), with infringing U. S. Letters Patent No. Des. 177,326, issued April 3, 1956 to Sidney Herman on "Bird Cage" [R. 97].

Plaintiff, concurrently with its complaint [R. 3], filed a Motion for Preliminary Injunction [R. 6], and an Order to Show Cause [R. 9] was issued on the same date.

Defendants opposed the Motion for Preliminary Injunction [R. 18] on the grounds that:

(1) A preliminary injunction should not be granted in a patent infringement suit unless the Court is convinced the defense is sham.

(2) The patent in suit had not been adjudicated and found valid.

(3) The patent in suit was applied for knowingly by other than the inventor and is therefore invalid.

(4) Bird cages showing essentially the design of the patent had been manufactured, sold and used more than one year prior to November 1, 1954, the filing date of the application for the patent in suit, and the patent is also invalid for that reason.

(5) A change in proportions is not patentable.

(6) A change in proportions for utilitarian purposes is not patentable.

(7) That, affirmatively, the trial court could not only deny the preliminary injunction, but could also dismiss the complaint.

Over the objection of defendants, the bond posted by plaintiff for the preliminary injunction was set in the amount of only One Thousand Dollars (\$1,000.00), thereby limiting defendants to a total of One Thousand Dollars (\$1,000.00) recovery for damages sustained as a result of the injunction.

As to the patent in suit, it is for a design for a tall cylindrical wire bird cage of vertical straight wires and horizontal, vertically spaced wire rings. It has a flat open top of straight crossed wires with a narrow band of sheet metal lying flat about the edge of the top and an integral circular flange disposed vertically about the top of the cylindrical side wall. This cage body rests in a sheet metal pan supported by three down-

wardly divergent rod-like legs with balls on their lower ends. One of the principal ornamental characteristics of the cage of the patent is a natural tree branch located within the cage, the main stem and sub-branches of which extend generally upwardly and somewhat outwardly toward the side wall of the cage. This specific shape of tree branch is shown in full lines in the drawing of the patent and is, therefore, a definite design limitation.

The shape and proportions of the cage of the design patent in suit are such that a considerable amount of interior cage space is provided, with a minimum of occupied supporting floor space. This is a purely utilitarian consideration.

Plaintiff's patentee Sidney Herman purchased from one Robert Kleid a bird cage substantially identically with the one designated "photograph of cage of Robert Kleid" [R. 98] prior to his application for patent, and patentee inquired of Kleid concerning the manner of manufacture of the cage and the source of his tree branches. Robert Kleid and the patentee Sidney Herman were employed at the same place of business at the time Kleid sold the cage to Herman and at this time, and prior to Herman's application for design patent, Kleid sold duplicate cages to other persons at the same place of employment. [R. 23, 24].

Others had manufactured, sold and/or used bird cages having straight vertical wire-like elements and vertically spaced horizontal rings to provide vertically elongated cylindrical cages with flat open work tops more than one year prior to the application for the

patent in suit. The same is true of the production and sale of such cages supported in pans, with the pans in turn supported by three rod-like legs.

The Complaint and Motion for Preliminary Injunction were filed June 22, 1956, less than three months after the issue of the patent in suit on April 3, 1956. The patent had not then been adjudicated nor is there any evidence that there has since been an adjudication. At the time of suit there was absolutely no acquiescence in the validity of the patent by the trade.

SPECIFICATION OF ERRORS

Defendants submit that the trial court erred:

1.

In granting a preliminary injunction on a newly issued design patent which had never been adjudicated or acknowledged to be valid by the trade.

2.

In granting a preliminary injunction where defendants presented a serious question of fact strongly showing that the patentee of the design patent in suit was not the inventor of the design and that said patentee had actual knowledge that he was not the inventor at the time he applied for the patent in suit.

3.

In granting a preliminary injunction where there was a serious question of fact presented regarding the validity of the design patent in suit, based upon an-

ticipatory prior art and prior public use and sale not considered by the U. S. Patent Office in granting said patent.

4.

In summarily ordering defendants to cease the manufacture and sale of the accused design of bird cage and permitting plaintiff, a company in poor financial condition, to post an entirely inadequate bond.

5.

In wording the preliminary injunction too broadly. The errors specified in paragraphs 1 through 5 are raised by paragraphs 1 through 5 of Defendants' Concise Statement of Points on Appeal [R. 92].

SUMMARY OF ARGUMENT

1.

A PRELIMINARY INJUNCTION SHOULD NOT HAVE BEEN GRANTED BY THE DISTRICT COURT.

- (a) The patent had not been adjudicated nor acquiesced in.
- (b) There were strong questions of fact raised by defendants regarding the validity of the patent in suit.
- (c) The findings of the District Court are not in accord with the evidence.

2.

THE PATENT IN SUIT IS INVALID

- (a) The patentee Herman did not invent the design of the patent in suit.
- (b) The patentee Herman filed his application for the patent in suit knowing that he was not the inventor thereof, yet signed an oath to the effect that he was the inventor.
- (c) Cages embodying the design of the patent in suit were sold more than one year prior to the application for said patent.
- (d) Cages embodying the features of the design of the patent in suit were shown in printed publications more than one year prior to the application for the patent in suit.
- (e) The general proportions of the cage are dictated by purely utilitarian requirements.
- (f) This court may not only refuse the order for preliminary injunction but may also dismiss the complaint.

3.

THE BOND REQUIRED OF PLAINTIFF WAS ENTIRELY INADEQUATE TO COVER THE DAMAGES TO DEFENDANTS AS A RESULT OF THE INJUNCTION.

4.

THE PRELIMINARY INJUNCTION WAS TOO BROADLY WORDED

ARGUMENT

POINT 1.

A PRELIMINARY INJUNCTION SHOULD NOT HAVE BEEN GRANTED BY THE DISTRICT COURT.

(a) The patent had not been adjudicated nor acquiesced in.

The patent in suit [R. 97] was granted April 3, 1956 and this action was filed June 22, 1956 [R. 3]. Not only did plaintiff fail to present any evidence of favorable adjudication of the validity of the patent but there was not sufficient time in which such adjudication could have been secured.

There was also a total lack of evidence tending to show acquiescence in its validity by the industry.

To grant a preliminary injunction in a patent case it is necessary to find that plaintiff's patent has been adjudicated and found valid. *Collins vs. Wallin*, 66 F. Supp. 687.

If the validity of a patent has been neither adjudicated nor acquiesced in by the public a preliminary injunction will not be granted. *National Cash Register Co. vs. Remington Arms Co.*, 283 F. 196, Aff. 286 F. 367, C.C.A. 3.

(b) There were strong questions of fact raised by defendants regarding the validity of the patent in suit.

The affidavit of Robert Kleid [R. 23], accompanying Defendants' Opposition To Plaintiff's Motion for Preliminary Injunction [R. 18] shows that during the week of July 4, 1954, affiant Kleid took twelve bird cages he had manufactured to the offices of Kirby Company of Los Angeles and sold all twelve of said cages to Kirby salesmen. Of that group of twelve cages, affiant sold one to the patentee Sidney Herman.

In the Kleid affidavit [R. 24] the affiant clearly describes a bird cage such as that designated "photograph of cage of Robert Kleid" [R. 98]. In the same affidavit affiant Kleid averred that patentee Sidney Herman inquired about the manufacture of the pan and the source of the tree branches which were placed in the cages.

If Sidney Herman had independently and previously conceived a design of bird cage substantially identical to that of the cage of Robert Kleid, it does not seem plausible that Herman would have purchased one of Kleid's cages and inquired of Kleid as to its manufacture and the source of tree branches used as perches.

Affiant Kleid states that some of the first cages which he made in conjunction with one Marvin Lulla were sold to The Coral Reef bird shop at the Farmers' Market about a month prior to the time he sold a cage to Sidney Herman during the week of July 4, 1954. Mr. Kleid also states that when patentee Sidney Her-

man purchased the cage from him, Mr. Herman talked as though he had never seen one like it before and also inquired as to where some of the materials were secured.

Mr. Kleid in his affidavit avers that the first cages made by Sidney Herman, some time after the sales meeting at the Kirby Company the week of July 4, 1954, were copies of the cages which affiant and Marvin Lulla had produced. These facts are not controverted by the patentee Sidney Herman.

Defendants produced evidence in the form of an affidavit of Solveig Kennedy [R. 33] to the effect that a Robert Kleid cage [R. 98] was purchased from him by her about three weeks before the week of July 4, 1954.

Defendants produced publications in the form of catalog illustrations showing bird cages containing the general features of the patented design and photographs of cages which had been manufactured and sold prior to one year before the application for the patent in suit. These publications and photographs will be referred to in connection with the discussion of the validity of the patent.

All of this evidence raised strong questions of fact regarding the validity of the patent and should have precluded the grant of a preliminary injunction. The order for the injunction by the District Court was a reversible abuse of discretion. A preliminary injunction should not be granted in a patent infringement

suit unless the court is convinced that the defense is sham. *Gantner vs. Unit Venetian Blind Supply Corp.*, D.C. S.D. Cal., 87 F. Supp. 338.

A preliminary injunction against infringement is not granted unless the patent is beyond question valid and infringed. *Leavitt vs. McBee Co.*, 124 F. 2d 938.

A preliminary injunction is refused against a design patent where defendant's affidavits and exhibits raise issue as to its validity and plaintiff's proofs fail to show public acquiescence. *Crescendoe Gloves, Inc., vs. Rubin*, 89 F. Supp. 922.

Where questions of fact are seriously disputed the matter will be left for final hearing. *Lare vs. Harper & Bros.*, 86 F. 481, 483, C.C.A. 3; *E. I. Horsman & Etna Doll Co. vs. Cauffman*, 286 F. 372, C.C.A. 2, Cert. Den. 261, U.S. 615; *Decorative Stone Co. vs. Building Trades Council*, 13 F. (2d) 123, C.C.A. 2, Cert. Den. 277, U.S. 594.

(c) The findings of the District Court are not in accord with the evidence.

Finding VIII [R. 76] is to the effect that the bird cage in question in a short time attained a surprisingly dominant economic position in the bird cage field by virtue of its novel appearance and unusual attractiveness of design. This finding is unsupported by any evidence. There is nothing in the record to indicate how many cages of any type were sold and there is no comparison between the volume of sales of the cage of the patented design and similar cages with other types

of bird cages. Insofar as the record is concerned, the volume of sales of bird cages similar to that of the patented design may even have been much less than that of any other type cage.

There is no finding as to whether Sidney Herman, the patentee, did or did not conceive the alleged invention of the patent in suit.

There is no finding as to whether the patentee Sidney Herman was or was not the first inventor, or even the inventor, of the design of the patent in suit.

There is no finding with regard to the substantial questions of fact raised by defendants as to the validity of the patent in suit.

There is no finding regarding the substantial questions of fact raised by defendants and showing that Sidney Herman was not the inventor of the patent in suit.

There is no finding regarding evidence produced by plaintiff, or the lack of such evidence which might controvert the substantial issues of fact raised by defendants.

There is no conclusion of law as to the possible presumptive validity of the patent in suit. The only conclusions of law are that the court had jurisdiction of the subject matter and the parties, that the plaintiff was entitled to a preliminary injunction and that the bond set by the court was adequate in the premises.

POINT 2.

THE PATENT IN SUIT IS INVALID

- (a) In addition to the questions of fact raised by defendants as referred to in Section 1(b) hereof, plaintiff itself filed the affidavit of Maurice R. Lazarus [R. 48] in support of its motion for preliminary injunction.

Mr. Lazarus is the brother-in-law of the patentee Sidney Herman [R. 49]. He avers that prior to August, 1954, and probably in July, 1954, Sidney Herman showed him a bird cage painted black with a tree disposed in the center and "which was substantially similar, to the best of my recollection, to that bird cage shown in Design Patent No. 177,326."

However, affiant Lazarus states [R. 49] that in August, 1954, he gave Sidney Herman a check to make a more commercially feasible model of his cage and that this cage was identical with the cage shown in the patent in suit.

It is important to note that the patentee Sidney Herman purchased the Robert Kleid cage [R. 98] during the week of July 4, 1954 [R. 23], at least several weeks before he received a check from Maurice Lazarus "to make a more commercially feasible model of his cage" in August, 1954 [R. 49].

Not only is the affiant Maurice Lazarus a relative by marriage of patentee Sidney Herman [R. 49], but he jointly engaged in the manufacture and sale of bird cages from August, 1954 to December, 1954 with said Sidney Herman [R. 50], yet Lazarus, as an affiant

for plaintiff, admits that the specific cage structure of the patent in suit was not designed until August, 1954, which was after Herman purchased the Kleid cage.

Affiant Lazarus avers that he saw a bird cage which was substantially similar, to the best of his recollection, to that of the patent in suit, at the home of Sidney Herman "probably in July, 1954." In the absence of evidence to the contrary, and there is none, and in view of the fact that Sidney Herman purchased a Robert Kleid cage during the week of July 4, 1954, it must be assumed that the cage which was shown to Lazarus by Herman in July, 1954, was the cage of Robert Kleid.

(b) The patentee Herman filed his application for the patent in suit knowing that he was not the inventor thereof, yet signed an oath to the effect that he was the inventor.

Title 35, U.S.C. 115, states:

"The applicant shall make oath that he believes himself to be the original and first inventor of the process, machine, manufacture, or composition of matter, or improvement thereof, for which he solicits a patent; and shall state of what country he is a citizen. Such oath may be made before any person within the United States authorized by law to administer oaths, or, when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any officer having an official seal and authorized to administer oaths in the foreign country in which the applicant may be, whose

authority shall be proved by certificate of a diplomatic or consular officer of the United States, and such oath shall be valid if it complies with the laws of the state or country where made. When the application is made as provided in this title by a person other than the inventor, the oath may be so varied in form that it can be made by him."

In Sections 1(b) and 2(a) hereof it has been pointed out the manner in which Sidney Herman purchased a wire bird cage having substantially the design characteristics of the Robert Kleid cage including the vertically elongated cylindrical wire cage body with its flat top, the supporting pan and the three downwardly divergent rod-like legs with knobs on their ends. To this design of cage, which embodies the principal characteristics of the patent in suit, Herman added three horizontal vertically spaced rings and the small sheet metal corner band about the top of the cage. Neither the three rings nor the corner band have any new or appreciable design characteristics.

A patent which is applied for by one who is not the inventor is void. *Kennedy vs. Hazelton*, 128 U.S. 667.

(c) Cages embodying the design of the patent in suit were sold more than one year prior to the application for said patent.

Harry Lachman [R. 31] gave an affidavit to the effect that he manufactured and sold tall cylindrical wire bird cages of vertically elongated mesh such as shown in Exhibit "C" attached to his affidavit [R. 32, 113]. This cage was sold by Mr. Lachman for several

years prior to July 3, 1956. This is, of course, more than one year prior to patentee's filing date of November 1, 1954, particularly as evidenced by invoices [R. 32] dated April 15, 1953 and May 5, 1953, photostat copies of which are exhibited [R. 113, 114].

(d) Cages embodying the features of the design of the patent in suit were shown in printed publications more than one year prior to the application for the patent in suit.

The 1930 catalog of The Andrew B. Hendryx Co. [R. 99] shows a cage [R. 100] which is cylindrical and whose body is made of vertical straight wires and vertically spaced horizontal rings. A similar type of design is shown [R. 100] and this cage has a substantially flat top. The Hendryx cage from the 1930 catalog [R. 102] shows the vertical wires and horizontal rings, a supporting pan and supporting legs therefor. A wire cage with a flat top, a band about the upper portion of the cylindrical body and a supporting pan are also shown by Hendryx [R. 103] and one of a very similar type in the same catalog [R. 104].

Defendant Pacific Cage and Screen Company's predecessor Pacific Coast Wire and Iron Works, in its 1938 catalog [R. 105] shows a cage [R. 106] of vertical straight wires, three vertically spaced horizontal rings, a supporting pan for the wire cage body and three rod-like legs.

While not referring to a published picture, the affidavit of Harry Lachman [R. 31] identifies an imported

Chinese cage [R. 111] which is cylindrical in shape and tall compared to its diameter. It is of straight vertical members and vertically spaced horizontal rings, it has a substantially flat top and presents a very similar appearance to the cage body of the patented design. This cage has been in the possession of Mr. Lachman for 10 to 15 years. Mr. Lachman also identified a cage [R. 112] which is made of straight vertical members and spaced horizontal rings with a flat open work top.

A design patent is not the same as a regular mechanical patent wherein new mechanical functions and structure are involved. To obtain a valid design patent is exceedingly difficult as pointed out by the Second Circuit Court of Appeals in *Charles D. Briddell, Inc. vs. Alglobe Trading Co.*, 103 F. Supp. 530.

The same exceptional talent is required for a design as for a mechanical patent. *Cornick vs. Stry-Lenkoff Co.*, 134 F. Supp. 126.

A design patent must be possessed of novelty. The adaptation of old devices to new purposes, however convenient or useful they may be in their new role, is not invention. *Western Auto Supply Co. vs. American-National Co.*, 114 F. (2d) 711 C.C.A. 6.

A design patent must disclose inventive originality in design and ornamentation. Mere mechanical skill is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer. *Capex Co. v. Swartz*, 166 F. (2d) 5, C.C.A. 7; *Cavu Cloths vs. Squires Inc.*, 185 F. (2d) 30, C.C.A. 6.

The fact that a design may be distinguished from those found in the prior art does not import the required novelty and ornamentation. Its overall aesthetic effect must represent a step which has required inventive genius beyond the prior art. *Burgess Vibrocrafters vs. Atkins Industries*, 204 F. (2d) 311, C.C.A. 7.

(e) The general proportions of the cage are dictated by purely utilitarian requirements.

As pointed out above cages which are supported by legs from the floor are old and cages which are taller than their diameters have also been designed before. The more exaggerated elongation of the height of the cage is purely utilitarian since it provides more interior cage space for a given amount of utilized floor space.

(f) This court may not only refuse the order for preliminary injunction but may also dismiss the complaint.

In *Mast Foos & Co. vs. Stover Manufacturing Co.*, 177 U.S. 485, it was held that the Circuit Court of Appeals could not only reverse an order granting a preliminary injunction but could also direct the court below to dismiss the complaint. This was followed in *Becker vs. Contoure Laboratories, Inc.*, 29 F. (2d) 31, 34, C.C.A. 2, and in *Brill vs. Peckham Motor Truck and Wheel Co.*, 108 F. 267, 271, C.C.A. 2. In the *Brill* case the court stated:

“The case is one in which it is apparent that the complainant cannot ultimately prevail, and, following the practice sanctioned by *Mast, Foos & Co. vs. Stover Mfg. Co.*, 177 U.S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, one in which the complaint should be dismissed.”

POINT 3.

THE BOND REQUIRED OF PLAINTIFF WAS ENTIRELY INADEQUATE TO COVER THE DAMAGES TO DEFENDANTS AS A RESULT OF THE INJUNCTION.

There are four defendants in this action. The District Court arbitrarily set the bond for the preliminary injunction at One Thousand Dollars. The affidavit of Joseph H. Babros, President of defendant Pacific Cage and Screen Co., [R. 72, 73] shows that said defendant had gross sales of its accused “Coronado” cages during 1955 in the neighborhood of One Hundred and Fifty Thousand Dollars and that plaintiff’s financial condition was very poor.

The amount of damage incurred by defendants as a result of the grant of the preliminary injunction undoubtedly is far in excess of the One Thousand Dollar bond but defendants cannot recover for such damages over the amount of the bond. This clearly was an abuse of discretion on the part of the District Court.

POINT 4.**THE PRELIMINARY INJUNCTION WAS
TOO BROADLY WORDED**

The injunction [R. 86] sets forth certain features of the design of the patent in suit with regard to which defendants are precluded. However, the definition of an elongated cylindrical body with spaced cylindrical rods (not limited to vertical rods), widely spaced horizontally oriented rings (of any type or kind whatsoever), a body supporting pan which is relatively deep and of sheet metal (the shape and proportions of which are not defined) supported upon three wrought iron legs (presumably of any shape, size or design), and the body at its upper extremity having a sheet metal ring or cap with a depending cylindrical flange and a horizontal flange overlying the top of the body (there being no definition of the extent, shape or design of either flange).

A design patent is limited to what is shown in the drawing. The court abused its discretion in granting an injunction which is so worded that the defendants are prohibited from manufacturing bird cages which would depart widely from the design of the patent in suit.

CONCLUSION

It is respectfully submitted that the District Court abused its discretion in granting the preliminary injunction in the face of strong evidence that the patent in suit is invalid in view of the prior art, as well as evidence strongly tending to show that the patentee filed his application for patent with full knowledge that he was not the inventor of the patented design.

The District Court abused its discretion in summarily issuing the preliminary injunction and in requiring an entirely inadequate bond.

For the reasons hereinabove stated defendants respectfully submit that the interlocutory order of the District Court be reversed and that the patent be decreed invalid for anticipation and want of patentability over the prior art and further because the patentee knowingly was not the inventor of the design thereof.

Respectfully submitted,

FRED H. MILLER

and

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HAZARD & MILLER

By.....

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Attorney for Appellant.

Dated:

No. 15454

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CAGE AND SCREEN Co., a corporation; PET
DEALERS SUPPLY COMPANY, a corporation; MER-
CHANTS PET SUPPLY COMPANY, a corporation; and
JOHN MIDDELKOOP,

Appellants,

vs.

CONTINENTAL CAGE CORPORATION, a corporation,

Appellee.

APPELLEE'S BRIEF.

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FILED

AUG 15 1957

PAUL P. O'BRIEN, CLERK

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APPELLEE'S BRIEF.

Summary of Argument.

I.

A PRELIMINARY INJUNCTION WAS PROPER IN THE
PREMISES.

A. Irreparable harm was being done to Appellee by
Appellants.

B. The Court had before it adequate evidence to sup-
port its grant of injunctive relief.

II.

THE INFRINGEMENT OF THE PATENT WAS OF A MOST
FLAGRANT AND OBVIOUS NATURE.

A. The Court had before it all of the evidence pertaining to infringement.

B. Appellants make no attempt to deny infringement.

C. The slavish imitation by Appellants is the criterion of the merit of the invention of the patent.

III.

THE PATENT IS VALID.

A. The design of the patent is new, original, and ornamental.

B. The prior art cited by Appellants fails to anticipate the design.

C. The evidence supports Herman as the inventor of the design.

D. The general proportions and appearance of the design are nonfunctional.

IV.

THE BOND REQUIRED OF APPELLEE WAS ADEQUATE IN
THE PREMISES.

V.

THE PRELIMINARY INJUNCTION WAS APTLY WORDED
IN THE LIGHT OF THE PATENT TO WHICH IT AP-
PLIED.

ARGUMENT.

I.

A Preliminary Injunction Was Proper in the Premises.

A. Irreparable Harm Was Being Done to Appellee by Appellants.

There is no question whatsoever in this case that the Appellee was being irreparably harmed by the actions of Appellants since, as pointed out by Joseph H. Babros, President of Appellant Pacific Cage and Screen Co. [R. 72-73], his company had gross sales of the infringing "Coronado" cages during 1955 in the neighborhood of \$150,000.00. The ruthless and utter disregard of Appellee's rights under the patent obviously was profiting, and is profiting, the Appellants to the great harm of the Appellee.

In *Ross-Whitney Corp. v. Smith, Kline and French Labs.* (C. A. 9, 1953), 207 F. 2d 190, 199, this Court held that an injunction may be granted to prevent irreparable injury and certainly the extent of infringing sales made by the Appellant Pacific Cage and Screen Co. in one year is a criterion of the harm being done by said Appellant to Appellee. In the course of such extensive sales, Appellant Pacific Cage and Screen Co. was irreparably destroying the business of the Appellee and Appellee's poor financial position, referred to [R. 72-73], was largely due to the overwhelming competition of Appellant Pacific Cage and Screen Co.

B. The Court Had Before It Adequate Evidence to Support Its Grant of Injunctive Relief.

The record is replete with alleged prior art constructions and the Court had before it all of these prior art constructions and the affidavits in support thereof when the motion for preliminary injunction was heard. The injunction was properly granted upon such evidence. (*Ross-Whitney Corp. v. Smith, Kline and French Labs., supra.*)

II.

The Infringement of the Patent Was of a Most Flagrant and Obvious Nature.

A. The Court Had Before It All of the Evidence Pertaining to Infringement.

At the hearing on the motion for preliminary injunction, the Court had before it the structures shown at page 98 of the record and also had before it a copy of the design patent No. 177,326. The Court was thus in a position to determine, in the light of the patent and in the light of the alleged infringing structures, whether the alleged infringing structures embodied the design of the patent. Such a determination can be made by a Court as an ordinary observer and no further analysis of the infringement is necessary.

The granting of the preliminary injunction after such determination by the Court was primarily a matter of discretion for the Court. (*LeBaron v. L. A. Bldg. & Construction Trades Council* (U. S. D. C. S. D. Cal., 1949), 84 Fed. Supp. 629, 634.)

B. Appellants Make No Attempt to Deny Infringement.

It is noted that Appellants have made no attempt to deny infringement of the patent in issue and the reasons for such failure are manifest. Seldom does such a slavish imitation of a patented design and such lack of ingenuity in attempted modification come before a court. The designs of the infringing structure and of the patent are substantially identical. Such identity was a sufficient basis for the Court to rule in Appellee's favor on the motion for preliminary injunction.

C. The Slavish Imitation by Appellants Is the Criterion of the Merit of the Invention of the Patent.

It has been repeatedly held that a defendant's imitation of a patented device or structure can be taken as evidence of invention as stated by Judge Hough in *Kurtz v. Belle Hat Lining Co.* (2 Cir.), 280 Fed. 277, 281:

"The imitation of a thing patented by a defendant, who denies invention, has often been regarded, perhaps especially in this circuit, as conclusive evidence of what the defendant thinks of the patent, and persuasive of what the rest of the world ought to think."

See also:

Otto v. Koppers Co., Inc. (C. A. 4, 1957), 114 U. S. P. Q. 188;

Robert W. Brown & Co., Inc. v. DeBell (C. A. 9, (1957), 113 U. S. P. Q. 172.

III.

The Patent Is Valid.

A. The Design of the Patent Is New, Original, and Ornamental.

Not a single one of the allegedly pertinent prior art references anticipates the design of the patent in suit. Appellants rely particularly heavily upon various types of prior art bird cages such as those shown in the record at pages 111 to 113 and other cages shown in the record at pages 101 through 106, but it is interesting to note that at the present time, with the threat of the infringement action over their heads, Appellants have not switched their manufacture to the cages of the prior art, but have, instead, posted a One Thousand Dollar bond to stay the enforcement of the preliminary injunction so that they may continue to manufacture and sell cages of the design of the patent. This, in itself, is a tribute to the inventive advance of the design of the patent over the prior art cited by the Appellant.

Furthermore, as stated by Judge Yankwich in *Laskowitz v. Marie Designer, Inc.* (D. C. S. D. Cal.), 119 Fed. Supp. 541, 544:

“Patentability exists if the design looked at as a whole (le tout ensemble) gives a pleasing impression. Of course, the result must come from the exercise of the inventive faculty. If these elements are present it is not material that the design may embody a regrouping of familiar forms and decorations.”

B. The Prior Art Cited by Appellants Fails to Anticipate the Design.

The Appellants have relied particularly heavily upon a bird cage shown at page 98 of the record and allegedly manufactured by one, Robert Kleid. That there are substantial distinctions between the appearance of the design of the patent and the design allegedly conceived by Robert Kleid is manifest from a cursory review of the photographs at page 98 of the record and it is, once again, interesting to note that the Appellants have not attempted to manufacture the design allegedly conceived by Robert Kleid but continue to manufacture and sell the design of the patent.

C. The Evidence Supports Herman as the Inventor of the Design.

There is ample testimony in the record as to Herman's conception of the invention. The affidavit of John Graf supports the conception by Herman of the design of the invention of the patent in suit. [R. 46-47.] Maurice Lazarus testified to the development of the design of the cage of the patent in suit by Herman. [R. 49-50.]

D. The General Proportions and Appearance of the Design Are Nonfunctional.

There can be little question that the attempt of Appellants to claim functionality of the design elements of the patent in suit is not well founded in view of the large number of prior art cages cited by Appellants in the record and differing substantially in appearance from the appearance of the cage of the patent. The design patent in issue is a rare one in which the configuration of all of the elements of the design is strictly arbitrary and the appearance thereof has no relationship whatsoever to function.

IV.

The Bond Required of Appellee Was Adequate in the Premises.

The Appellants have protested the amount of the bond but it should be pointed out that the Appellants base their position on the ground that Appellant Pacific Cage and Screen Co. was doing such a large business in the manufacture of the infringing cages. However, when said Appellant posted its bond to stay execution of the preliminary injunction, it only made a bond of One Thousand Dollars. The amount of the bond in a preliminary injunction is entirely within the discretion of the Court. (*Urban v. Knapp Bros. Mfg. Co.* (C. A. 6, 1954), 217 F. 2d 810, 815.)

V.

The Preliminary Injunction Was Aptly Worded in the Light of the Patent to Which It Applied.

In the preliminary injunction on the patent in suit, the Court clearly defined the design taught in the patent in issue. [R. 76.] It then went on to further define those aspects of the alleged infringing cages which it considered to be similar to the design of the patent. The Appellants were then enjoined against manufacturing and selling infringing cages.

It has been held that the findings of fact and conclusions of law in a preliminary injunction are all preliminary in nature and not to be construed as foreclosing any findings and conclusions to the contrary which may be based upon evidence received at the trial on the merits (*Ross-Whitney Corp. v. Smith, Kline and French Labs. supra.*)

It is submitted that the injunction and the findings of fact and conclusions of law in support thereof were adequate to define the enjoined acts and that the Appellants had a sufficient standard to rely on in avoiding the infringement enjoined.

Conclusion.

It is respectfully submitted that the District Court acted within its discretion in granting the preliminary injunction in issue here. It had before it a flagrant and outrageous infringement of the patent in suit and a voluminous record which enabled it to assay and evaluate the entire position of the Appellants. The Court had an opportunity to review its position on Appellants' motion for new trial [R. 60] and denied the same.

Therefore, it is respectfully submitted that the order of the District Court should be sustained and the patent held valid over the prior art.

Respectfully submitted,

THOMAS P. MAHONEY,

Attorney for Appellee.

Dated: August 13, 1957.

No. 15454

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Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 96, inclusive)

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

JUN 21 1957

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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For Appellee:

THOMAS P. MAHONEY,
4055 Wilshire Boulevard,
Los Angeles 5, California. [1]*

* Page numbers appearing at bottom of page of original Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

Civil Action No. 20084-HW

CONTINENTAL CAGE CORPORATION,
a corporation, Plaintiff,
vs.

PACIFIC CAGE AND SCREEN CO., a corpo-
ration; PET DEALERS SUPPLY COM-
PANY, a corporation; MERCHANTS PET
SUPPLY COMPANY, a corporation; and
JOHN MIDDELKOOP, Defendants.

COMPLAINT FOR INFRINGEMENT OF
UNITED STATES LETTERS PATENT
No. Des. 177,326

Plaintiff, complaining of defendants, avers as fol-
lows:

I.

Plaintiff, Continental Cage Corporation, is a Cal-
ifornia corporation having a regular and estab-
lished place of business at Culver City, California,
within this judicial district.

II.

Defendant, Pacific Cage and Screen Co., is, upon
information and belief, a California corporation
having a regular and established place of business
at Los Angeles, California, within this judicial dis-
trict.

III.

Defendant, Pet Dealers Supply Company, is, upon information and belief, a California corporation having a regular and established place of business at Huntington Park, California, within this judicial district. [2]

IV.

Defendant, Merchants Pet Supply Company, is, upon information and belief, a California corporation having a regular and established place of business at Los Angeles, California, within this judicial district.

V.

Defendant, John Middelkoop is, upon information and belief, a citizen of the State of California and resides in Los Angeles County within this judicial district.

VI.

This action arises under the Patent Laws of the United States of America and this Court has jurisdiction thereof under 28 USC 1338(a) and 1400(b).

VII.

On April 3, 1956, United States Letters Patent No. Des. 177,326 were duly and legally issued to plaintiff, Continental Cage Corporation, for an invention in "Bird Cage", by virtue of mesne assignment from the applicant, Sidney Herman, and ever since said date said plaintiff has been, and now is, the owner of said Letters Patent. Profert of said Letters Patent is hereby made.

VIII.

Plaintiff, Continental Cage Corporation, did give written notice to the defendants, and each of them, on April 26, 1956 to cease infringing the said Letters Patent.

IX.

Defendant, Pacific Cage and Screen Co., has been and is infringing these Letters Patent by making, using, and selling bird cages embodying the patented invention, and defendants Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop have been infringing these Letters Patent by selling bird cages manufactured by the Defendant, Pacific Cage and Screen Co., and all of these defendants will continue to do so unless enjoined [3] by the Court.

Wherefore, plaintiff, Continental Cage Corporation, prays the Court for a judgment against the defendants as follows:

1. That the defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with them be severally and jointly enjoined temporarily during pendency of this action, and permanently after final hearing, from the infringement of United States Letters Patent No. Des. 177,326.

2. That the defendants be required to pay over and account to plaintiff for all gains, profits, and advantages derived from the infringing acts of defendants.

3. For damages sustained by plaintiff by reason of defendants' infringement.

4. That the minimum amount of Two Hundred Fifty Dollars (\$250.00) for the infringement of said Letters Patent be paid by defendants.

5. That the defendants pay to plaintiff the costs of this action allowed to plaintiff by the Court and reasonable attorney's fees.

6. That plaintiff have such other and further relief as is just.

CONTINENTAL CAGE CORPORATION,

/s/ By ROBERT M. OTIS, SR.,
Plaintiff.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [4]

Duly Verified.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

MOTION AND NOTICE OF MOTION FOR
PRELIMINARY INJUNCTION AND
POINTS AND AUTHORITIES IN SUP-
PORT THEREOF

Plaintiff moves the Court for issuance of an injunction to forbid, restrain, and enjoin the defendants, their officers, agents, employees, and representatives, during the pendency of this action or until

further order of this Court, from infringing United States Letters Patent No. Des. 177,326.

In support of this Motion, plaintiff submits the complaint and the affidavit and points of authorities appended hereto.

Dated: This 22nd day of June, 1956.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff.

Notice of Motion

To the Defendants:

Please Take Notice that the plaintiff will bring the above motion for issuance of a preliminary injunction on for hearing [6] before the Hon. Thurmond Clarke, U. S. District Judge, in this courtroom in the U. S. Courthouse at Los Angeles, California, on the 9th day of July, 1956, at 11 a.m. o'clock, or as soon thereafter as counsel can be heard.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [7]

AFFIDAVIT OF ROBERT M. OTIS

State of California,
County of Los Angeles—ss.

Robert M. Otis, being duly sworn, deposes and says that:

1. I am the President of Continental Cage Corporation, a California corporation, located at and doing business at 11446 Knightsbridge Avenue, Culver City, California.

2. I have engaged in the manufacture and sale of bird cages under United States Letters Patent No. Des. 177,326.

3. Continental Cage Corporation is the assignee of United States Letters Patent No. Des. 177,326.

4. I have inspected the infringing products manufactured and sold by the defendants.

5. The infringing products, and particularly the "Coronado" design, are substantially identical in appearance with the design of the cage disclosed in United States Letters Patent No. Des. 177,326.

6. The infringing acts of the defendants have had a damaging effect on the business of Continental Cage Corporation and further and continuing infringing by the defendants will cause irreparable harm to Continental Cage Corporation.

/s/ ROBERT M. OTIS SR.

Subscribed and sworn to before me this 22nd day of June, 1956.

[Seal] MIRIAM H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

To the Defendants, Pacific Cage and Screen Co.,
Pet Dealers Supply Company, Merchants Pet
Supply Company, and John Middelkoop:

Plaintiff having filed its complaint and a Motion
for Preliminary Injunction, together with Affi-
davits in support of said Motion, and good cause
appearing:

It Is Ordered that defendants appear before the
Hon. Thurmond Clarke, Judge of the U. S. District
Court, in the courtroom of said Judge in the U. S.
Courthouse at Los Angeles, California, on the 9th
day of July, 1956, at 11 a.m. o'clock then and there
to show cause, if any they have, why the defendants
and their officers, agents, employees, and other rep-
resentatives should not be forbidden, restrained,
and enjoined, during the pendency of this action
and until further order of this [11] Court, from in-
fringing upon United States Letters Patent No.
Des. 177,326.

It Is Further Ordered that a copy of said Com-
plaint, Motion for Preliminary Injunction and Affi-
davits in support of said Motion, and this Order be
served upon defendants forthwith.

Dated: This 22nd day of June, 1956.

/s/ LEON R. YANKWICH,

Judge, U. S. District Court. [12]

[Endorsed]: Filed June 22, 1956.

[Title of District Court and Cause.]

AFFIDAVITS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In support of its Motion for Preliminary Injunction on file herein, Plaintiff submits the attached supplementary affidavits of Robert M. Otis, James S. Hanks, George J. Meyer, and Albert A. Ardmore.

Dated: At Los Angeles, California this 9th day of July, 1956.

/s/ THOMAS P. MAHONEY [13]

SUPPLEMENTARY AFFIDAVIT OF
ROBERT M. OTIS

State of California,
County of Los Angeles—ss.

Robert M. Otis, being duly sworn, deposes and says that:

1. I am the President of Continental Cage Corporation, a California corporation, located at and doing business at 11446 Knightsbridge Avenue, Culver City, California.

2. I have conducted a thorough investigation of, and I am fully familiar with, the products manufactured by Pacific Cage and Screen Co.

3. While Pacific Cage and Screen Co. has sold large numbers of its Coronado model and other

cylindrical bird cage models alleged to infringe United States Design Letters Patent No. 177,326, the total volume of said sales constitutes a relatively small portion of the entire sales of Pacific Cage and Screen Co. and an injunction preventing the sale of such bird cages would not be of material or irreparable harm to the defendant Pacific Cage and Screen Co.

4. I am also familiar with the line of products manufactured by Customcraft Industries, Inc. and know that that company manufactures a wide variety of bird and animal cages and that, while it has manufactured a substantial number of infringing Show Piece and other cylindrical model cages, the bulk of the production and sales of Customcraft Industries, Inc. is in other lines and other designs of cages.

5. Therefore, if a preliminary injunction were to issue on the Motion for Preliminary Injunction made herein, irreparable harm would not be caused to Customcraft Industries, Inc. in view of the fact that it does not depend wholly, or to any significant extent, on the manufacture and sale of the alleged infringing Show Piece and other model cages.

6. However, the plaintiff Continental Cage Corporation has confined its endeavor primarily to the manufacture of cylindrical [14] type bird cages and the infringing acts of the defendants, and each of them, have severely injured the competitive position of the plaintiff and irreparable harm and damage will be caused to the plaintiff if the defendants

are permitted to continue their willful and wanton infringement of said Letters Patent No. Design 177,326 during the period prior to and including the trial of this action.

/s/ ROBERT M. OTIS.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ MIRIAN H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

AFFIDAVIT OF JAMES S. HANKS

State of California,
County of Los Angeles—ss.

James S. Hanks, being duly sworn, deposes and says that:

1. I reside at 4719 West 170th Street, Lawndale, California.

2. I was the Sales Manager of the animal cage division of Customcraft Industries, Inc. for the year extending from April, 1955 to April, 1956.

3. I am now the Sales Manager for Continental Cage Corporation of Culver City, California.

4. During my sales experience with animal cages of various types, I became quite familiar with all types of cylindrical bird cages.

5. I have actually purchased samples of Pacific Cage and Screen Co's Coronado model of a cylindrical bird cage and have compared the same with

the bird cage shown in United States Design Letters Patent No. 177,326 and I am of the opinion that the design of the Coronado model is an outright infringement of said patent in view of its incorporation of all of the essential features of the patent.

6. Furthermore, the designs of the Coronado and the bird cage shown in the patent are confusingly similar to such an extent as to delude and mislead ordinary purchasers who would attempt to distinguish between the designs of the two cages.

7. I am also familiar with the No. 8200 Series Show Piece floor model cylindrical bird cage manufactured by Customcraft Industries, Inc. and have compared the design of said cage with that shown in the above referenced patent, No. 177,326, and I am of the opinion that the two designs are substantially the same.

8. I am further of the opinion that the No. 8200 Series cage of Customcraft Industries, Inc. is so similar to the cage shown in [16] said patent as to confuse and mislead the ordinary purchaser into thinking that it is a cage manufactured in accordance with the teachings of said patent.

/s/ JAMES S. HANKS.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ MIRIAM H. AULD,

Notary Public in and for the above County and State. My Commission Expires Aug. 31, 1958.

AFFIDAVIT OF GEORGE J. MEYER

State of California,
County of Los Angeles—ss.

George J. Meyer being duly sworn, deposes and says that:

1. I reside at 10951 Fairbanks Way, Culver City, California.

2. I have been engaged for over a year in the sale of bird cages, operating independently, and as a salesman for the Ardmore Pet Supply Co., Baldwin Products, and other manufacturers of bird and animal cages.

3. During my employment in this manner, I have had an opportunity to become familiar with the shapes and sizes of all types of bird and animal cages customarily marketed to pet shops, pet distributors, and the like.

4. I have also had an opportunity to study the design of the cage shown in Design Letters Patent No. 177,326 and I am of the opinion that the design disclosed therein is highly novel and I have not encountered, until recently, bird cages of such design.

5. I have had an opportunity to compare the design disclosed in the above referenced patent with the Coronado model cylindrical bird cages manufactured by Pacific Cage and Screen Co. and I am of the opinion that the design of the Coronado cage is an outright copy of the design disclosed in said Design patent No. 177,326.

6. Furthermore, I am of the opinion that the similarity of designs is such as to confuse the ordinary purchaser of such bird cages and I, myself, have considerable difficulty in distinguishing between the two cages.

7. Furthermore, I have also studied the Customcraft Industries, Inc.'s cage manufactured and sold by Customcraft Industries, Inc. under Series No. 8200, Show Piece model, and have compared the design of said cage with that of the cage disclosed in the above patent. [18]

8. While there are certain minor distinctions in appearance between the Customcraft Industries, Inc.'s Show Piece model and the cage disclosed in said patent, I am of the opinion that the over-all appearance of the two cages is substantially identical and so close as to confuse an ordinary purchaser and delude said purchaser into thinking he was purchasing the cage of the patent when purchasing the Show Piece model.

/s/ GEORGE J. MEYER.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ KENNETH E. KAYDEN,
Notary Public in and for County of Los Angeles,
State of California. My Commission expires
Nov. 22, 1959. [19]

AFFIDAVIT OF ALBERT A. ARDMORE

State of California,
County of Los Angeles—ss.

Albert A. Ardmore, being duly sworn, deposes and says that:

1. I reside at 10538 Bradbury Road, Los Angeles, California.

2. I was formerly a distributor of bird and animal cages for Customcraft Industries, Inc., Pacific Cage and Screen Co., Reliance Sales Co., and others.

3. As the distributor of such bird and animal cages, I have become quite familiar with the various types of cages manufactured and sold by the bird cage industry.

4. I have had an opportunity to study the disclosures of United States Design Letters Patent No. 177,326, and particularly the drawing thereof, which shows a cylindrical bird cage which is, in my opinion, highly novel in conception and appearance.

5. I have studied a Coronado model bird cage manufactured by Pacific Cage and Screen Co. and have compared it with the drawing of the bird cage in the above referenced patent and I am of the opinion that the Pacific Cage and Screen Co.'s Coronado model is a flagrant copy of the bird cage disclosed in said patent.

6. From my experience with the trade at large, I am convinced that the ordinary consumer would

be completely confused by the Pacific Cage and Screen Co.'s Coronado model into thinking he was purchasing a cage manufactured in accordance with the teachings of the above referenced patent.

7. Moreover, I have had an opportunity to review the appearance of the No. 8200 Series Show Piece model bird cage manufactured by Customcraft Industries, Inc. and have compared the Show Piece model bird cage with the drawing of the aforementioned patent and have come to the conclusion that the minor variations made in the appearance of the Show Piece model do not clearly distinguish said cage [20] from that disclosed in the patent.

8. I am further of the opinion that the Customcraft Industries, Inc.'s Show Piece model is so similar to that bird cage disclosed in the above referenced patent as to completely confuse a potential purchaser of bird cages and to cause such a purchaser to buy the Customcraft Industries, Inc.'s Show Piece model thinking he was purchasing the bird cage disclosed in said patent.

/s/ ALBERT A. ARDMORE.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ PATRICE HOFFMAN,
Notary Public in and for the above County and
State. [21]

[Endorsed]: Filed July 9, 1956.

[Title of District Court and Cause.]

OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Now come the defendants and request this honorable Court to dismiss plaintiff's Motion for Preliminary Injunction.

In opposition to the motion, defendants submit the affidavits and points and authorities.

1.

A preliminary injunction should not be granted in a patent infringement suit unless the Court is convinced that the defense is sham. *Gantner vs. Unit Venetian Blind Supply Corp.*, DC SD Cal. 84 USPQ 266.

The affidavit of Robert Kleid discloses that the affiant manufactured and sold bird cages approximately a month prior to the week of July 4, 1954; that he sold a cage embodying the features of the patent in suit to one Sue Kennedy about three weeks prior to the week of July 4, 1954; that he sold twelve cages embodying the patented [22] design in suit on a day of the week of July 4, 1954, one of the twelve cages being sold to Sidney Herman, the patentee of the patent in suit; that Sidney Herman at that time inquired of the affiant concerning the manufacture of the pan for the cage and asked affiant where he secured the tree branches which were in the cages; that to the best of affiant's knowledge he and one Marvin Lulla were the first to produce bird cages of this general type; that to

his knowledge the first cages made by the patentee Sidney Herman, some time after the sale of affiant's cage to Sidney Herman, were copies of affiant's cages.

2.

To grant a preliminary injunction in a patent case it is necessary to find that plaintiff's patent has been adjudicated and found valid and also that defendant will be unable to respond in money damages. *Collins vs. Wallin*, DC Mass. 70 USPQ 34.

Plaintiff has offered no evidence of the adjudication of the patent in suit. The affidavit of Joseph Babros states that plaintiff has widely circulated customers of defendant Pacific Cage and Screen Co., threatening those customers with infringement suits and that these acts have resulted in refusal of customers to purchase that defendant's cages, and that they were committed by plaintiff with full knowledge that affiant, President of Pacific Cage and Screen Co., has been in business many years in Los Angeles and is a responsible business man of good standing and fully capable of satisfying any judgment which might be rendered in this proceeding.

3.

A patent which is applied for by one who is not the inventor is void. *Kennedy vs. Hazelton* 128 US 667.

The affidavit of Robert Kleid, as pointed out above, shows that Sidney Herman, patentee of the patent in suit, was not the inventor thereof but secured the idea from the affiant Robert Kleid.

A preliminary injunction against infringement is not [23] granted unless the patent is beyond question valid and infringed. *Leavitt vs. McBee Co.*, CCA-1 52 USPQ 193.

A preliminary injunction is refused against a design patent where defendant's affidavits and exhibits raise issue as to its validity and plaintiff's proofs fail to show public acquiescence. *Crescendoe Gloves Inc. vs. Rubin*, DC NY 85 USPQ 206.

Not only do the affidavits furnished by defendant raise an issue as to validity but they show invalidity.

The affidavit of Harry Lachman, in Exhibit "A" thereof, shows a bird cage having the general proportions and appearance of that of the patent in suit, which cage was imported from China and has been in the possession of affiant for 10 or 15 years. Exhibit "B" of Mr. Lachman's affidavit is a photograph of another cage which he has had an equal period of time and shows the open work cylindrical shape with the open work flat top. The cage of Exhibit "A" also shows a supporting pan with legs. The affiant Lachman states that he has made cages similar to Exhibit "C" for several years past. From the records of Mr. Lachman there is evidence of the purchase of materials for the cages of Exhibit "C" dated in 1953, more than one year prior to the date of application for the Herman patent in suit.

The affidavit of Solveig Kennedy verifies the purchase by her from the affiant Robert Kleid of a cage embodying the features of the design in suit about three months prior to the termination of her em-

ployment with the Lynch Kirby Company in the third week of August, 1954. This date places the date of purchase about the middle of June, 1954, or as stated by Robert Kleid, about three weeks before the week of July 4, 1954, at which latter time he sold one of his cages to Sidney Herman.

There are other facts supporting the manufacture and sale of cages of the design in suit prior to the application of Sidney Herman which are found in the attached affidavits. John Jamieson verifies the long possession of the Chinese cages by Harry Lachman. [24]

Michael Capobianco verifies the early purchase of cages from Robert Kleid, Marvin Lulla (mentioned by Kleid as having been associated with him), and Herman Shapiro of Dealers Manufacturing Company (corroborated by the Shapiro affidavit). The affidavit of Joseph Babros sets forth that he first saw a cage of the design of the patent in suit in September, 1954, two months prior to the date of application for the patent in suit and that this cage was manufactured by Dealers Manufacturing Company, that Babros had first been requested to manufacture a cage of the design in suit by Germain's Inc., Pet Shop Department, according to instructions supplied by them and that he manufactured such a cage before ever having seen cages made by Sidney Herman or his assignee.

4.

A design patent on a box is not patentable where the design is directed to the proportions of the box

or a box with a rounded cover. Shoe Form Co. vs. Erwin Corp., DC NY 71 USPQ 144.

5.

The cage of the patent in suit is made in the shape illustrated to give the bird more room for movement without increasing the floor space required. That a design is utilitarian does not answer the requirement that it must be original. Hueter vs. Sears, Roebuck Co., DC ND Ohio 91 USPQ 238.

6.

The Court may not only deny the motion for preliminary injunction but may also dismiss the complaint. In Mast Foss and Co. vs. Stover Manufacturing Co., 177 US 485, it was held that the Circuit Court of Appeals could not only reverse an order granted a preliminary injunction but could also direct the Court below to dismiss the Bill of Complaint. [25]

Whereupon defendants move this honorable Court to deny plaintiff's motion for a preliminary injunction and to dismiss the complaint.

July 6, 1956.

Respectfully submitted,

/s/ ALLAN D. MOCKABEE,

Attorney for Defendants. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT KLEID

State of California,
County of Los Angeles—ss.

Robert Kleid, first being duly sworn, deposes and says:

I reside at 15511½ North Poinsettia Place, Hollywood, California, and am employed by a sewing machine store at 1453 Fourth Street, Santa Monica, California.

In 1954 I was employed at Kirby Company of Los Angeles, 522 North La Brea, Hollywood, California.

While employed there I began working with Marvin Lulla and his brother Ronald in the manufacture and sale of bird cages as a side line to my regular employment. I have no records of the cages manufactured and sold, but to the best of my recollection, we began making them in the early part of June, 1954, before Marvin [27] Lulla's brother returned from school in the East for his summer vacation.

During the week of July 4, 1954, there was a sales meeting at the Kirby Company. I remember the particular meeting because of the fact that it was the same week as July 4. I took 12 cages down to the Kirby place that morning and sold all 12 of them to Kirby salesmen. Of that group of 12 cages, the first one I sold the morning of the sales meeting was to Sidney Herman, who was a Kirby salesman at the time. To the best of my knowledge and belief he is the same Sidney Herman who is the patentee

of United States Patent No. Des. 177,326, issued April 3, 1956.

The 12 cages mentioned above, and including the cage I sold to Sidney Herman the week of July 4, 1954, each had a side wall which was cylindrical in shape and formed of wire mesh, known as hardware cloth, the mesh being approximately $\frac{1}{2}$ " square. The cage had a flat wire mesh top and, in proportion it was considerably taller than its diameter. Each of these cages had a bottom pan in which the cylindrical wire portion rested and the pan was supported by three wrought iron rod legs with rubber bumpers on their lower ends. In each cage was a piece of natural wood in the form of a tree branch which served as a perch structure.

Shortly after I sold the cage to Sidney Herman, he inquired about the manufacture of the pan and he asked me where I secured the tree branches. I told him that I went out into the San Fernando Valley and picked them up in wooded areas.

About three weeks before the sales meeting at which I sold a cage to Sidney Herman, I had a cage down at the Kirby place and it had two parakeets in it. Sue Kennedy, who was the bookkeeper there at the time, saw the cage and said that she must have it. I sold it to her at that time, about three weeks before the sales meeting mentioned above, with the two parakeets in it, for \$21.00.

Marvin Lulla and I made some inquiries about the securing [28] of patent protection but I reached the conclusion that there was nothing patentable about the cage.

I sold some of the first cages we made to The Coral Reef bird shop at the Farmers' Market about a month prior to the Kirby sales meeting of the week of July 4, 1954.

To the best of my knowledge, Marvin Lulla and I were the first to produce bird cages of this general type. If Sidney Herman had conceived a bird cage of this type before the Kirby sales meeting of the week of July 4, 1954, I do not believe he would have purchased one from me, particularly in view of the fact that he talked as though he had never seen one like it before and he later asked me questions about how it was made and where some of the materials were secured. Also his first cages, made some time after the above sales meeting, were copies of the cages which Marvin Lulla and I had previously produced.

/s/ ROBERT KLEID.

Subscribed and sworn to before me this 5th day of July, 1956.

[Seal] /s/ THEODORE B. FACH,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires July 19, 1958. [29]

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH H. BABROS

State of California,
County of Los Angeles—ss.

Joseph H. Babros, first being duly sworn, deposes and says:

I am the President of Pacific Cage and Screen Co. a defendant in the above entitled action with offices at 3110 South Main Street, Los Angeles, California.

In August or September, 1954, a Mr. Johnson, then Purchasing Agent for Germain's Inc. pet shop department, 625 South Hill Street, Los Angeles, California, asked me to make a cylindrical wire mesh bird cage which was tall compared to its diameter, with a flat top and supporting legs. I was busy on other matters and was not particularly interested in making the cage. However, Mr. Johnson brought me the materials necessary for making it and asked me to [30] build the cage.

Because of the pressure of other business in my plant, which included the manufacture of fire place screens, various types of bird cages and other wire products, I did not immediately begin to construct the cage.

On September 24, 25 and 26, 1954, I was present at a showing of bird cages at the Biltmore Hotel in Los Angeles. There I saw a relatively tall cylindrical cage of wire screen with a flat top and supporting legs. This cage was one manufactured by Dealers Manufacturing Co. of Los Angeles. I talked to Mr. Sunderling of The Merchants Pet Supply Co. of Los Angeles. At that time I told Mr. Sunderling that I was not particularly interested in the manufacture of this general type of cage. Mr. Sunderling replied that the cages were selling and that I should make one. His company is one of my distributors and since he seemed to be interested, I

told him that if cages of that size sold well I would, of course, consider manufacturing them.

I did not see any cages of this general type at the show which were manufactured by Continental Cage Corporation and I had not seen any at any other location.

In November of 1954 I completed the cage for Germain's which had been requested by Mr. Johnson. It was made of open wire mesh with a flat top, the legs supported a pan in which the cage proper rested and the top of the cage was made of an inverted pan. These pans were of spun aluminum and the legs were of brass finish.

I did not, in subsequent manufacture of large wire mesh bird cages with cylindrical sides, copy any cage of Continental Cage Corporation but secured my ideas from Mr. Johnson of Germain's, from the cage of Dealers Manufacturing Co. which I saw at the show, and from ideas of my own.

I gave no thought to the possibility that anyone had any type of patent protection on the cages because cylindrical cages are [31] old, it is old to make them of wire mesh or screen, to provide them with flat tops and to put them on legs.

In my plant I have catalogs of other manufacturers. One of them is the catalog of "Hendryx." It is the Hendryx catalog No. 42 bearing the date 1930. Attached hereto are photostat copies of the title page of the Hendryx catalog and pages 2a, 40, 49, 57 and 58. Page 58 shows a small animal laboratory cage, No. 6R, which has a wire mesh side wall of

cylindrical shape and a flat wire mesh top. There is also shown a deep pan in which the cage rests. The top of the cage has a solid metal band about it.

A very similar cage is shown on page 57 of the Hendryx catalog. Page 49 of the catalog shows a cage of cylindrical shape with vertical wires connected by vertically spaced horizontal rings. The cage rests on a shallow pan and the pan is supported by legs.

Page 40 of the Hendryx catalog shows a cage which is cylindrical with a substantially flat top, the cage being made of spaced parallel wires connected by vertically spaced rings.

Page 2a of the catalog shows a cage of spaced parallel wires which is cylindrical in shape. It also has vertically spaced rings connecting the vertical wires, a bottom pan with an upstanding flange to receive the wire portion of the cage and legs upon which the cage may be supported.

The photostats of the Hendryx catalog cages are identified as Exhibit "A" of this affidavit.

Also attached hereto as Exhibit "B" hereof is the cover page of my Company's catalog for August 1, 1938 and page 11 thereof. Page 11 shows a cage of vertical spaced parallel wires connected by vertically spaced rings, the wire portion of the cage resting in a pan, and the pan being supported by three legs.

Continental Cage Corporation, plaintiff in the above entitled [32] action, according to reports received by me, has generally circularized customers

of Pacific Cage and Screen Co., the defendant company of which I am president, threatening those customers with suits for infringement. These acts by plaintiff, company's representatives and counsel have resulted in the refusal of customers to purchase the accused cages made by my company.

These acts were committed by plaintiff with full knowledge that I have been in business many years in Los Angeles and I am a responsible business man of good standing and fully capable of satisfying any judgment which might be rendered in this proceeding.

An example of plaintiff's acts which has irreparably harmed my company is found in the attached Exhibit "C", a photostat copy of a letter dated May 11, 1956 from J. J. Newberry Co., a large chain retailer, forwarding to me a copy of a letter from Thomas P. Mahoney, counsel for plaintiff, dated April 26, 1956. The direct result of Mr. Mahoney's letter to the Newberry Company was the cancelling of all shipments to Newberry and a direction to my company *to all* orders which might have been or might be received from Newberry.

Exhibit "D" is a photostat copy of a letter dated June 8, 1956, from Jim Hanks, Continental Cage Corporation, to Glen Bauerly, Arrow Pet Supply Co., Portland, Oregon, together with an illustrated price list. Arrow Pet Supply is an established purchaser of my company's cages. In his letter, Jim Hanks states that my company has already offered to stop manufacture "provided we will allow them

to get rid of their present commitments." The letter of Mr. Hanks further indicates that plaintiff would not permit defendant Pacific Cage and Screen Co. to do this.

There was some discussion of settlement of the controversy between my company and the plaintiff but Mr. Otis, president of Continental Cage Corporation, stated that he would grant my company a license for \$10,000.00 cash and a royalty of 6% of the amount received [33] on each cage sold by my company. The amount demanded was prohibitive and inasmuch as I felt there was nothing legally patentable about the cage and that Sidney Herman was not the inventor, I elected to defend what I feel are my just and legal rights.

Unless plaintiff is promptly prevented from pursuing a course which is aimed at control of all cages of open wire work which are cylindrical in shape with flat open work tops and supported by legs, irreparable injury will be done, not only to my company, but to others against whom plaintiff has filed suit.

/s/ JOSEPH H. BABROS.

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ KATHLEEN F. McLAREN,
Notary Public, in and for the County of Los Angeles, State of California. My Commission expires April 2nd, 1960. [34]

[Note: Exhibits are set out in the Book of Exhibits.]

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY LACHMAN

State of California,
County of Los Angeles—ss.

Harry Lachman of 11907 Wilshire Boulevard, Los Angeles, California, first being duly sworn, deposes and says:

I am the proprietor of The Patio Workshop, 11907 Wilshire Boulevard, Los Angeles, California, dealer in antiques, wrought iron work, bird cages and miscellaneous home decorations and artistic accessories.

I have, in the course of my business, for many years purchased and sold bird cages of various types. Exhibit "A" attached hereto is a photograph of a bird cage which has been in my possession for at least 10 years last past and probably for 15 years. It is a Chinese import. Its shape is cylindrical and it is tall compared to its diameter. It has a bottom pan supported by legs, a band [47] about the lower side portion, horizontal rings intermediate the top and bottom which, with the spaced vertical members, provide narrow, vertically elongated openings and an open-work flat top.

The attached photograph, Exhibit "B", is that of another Chinese bird cage similar to Exhibit "A" with respect to its cylindrical form, flat open-work top and intermediate horizontal rings with thin

spaced vertical side members. This cage has also been in my possession for 10 years or more.

I have had manufactured for me and have sold tall cylindrical wire bird cages of vertically elongated mesh such as shown in Exhibit "C" attached hereto. It is illustrated on the back cover of the exhibit and bears the numbers 601 and 602. This cage has been sold by me for several years past. They have been made for me by E. W. Frederick who manufactures metal specialties at 6154 $\frac{1}{2}$ Santa Monica Boulevard, Hollywood 38, California. Attached hereto are photostat copies of original invoices in my records, said invoices being from Mr. Frederick for the manufacture and sale to me of cages of Exhibit "A" as follows:

April 15, 1953 No. 1471 1—36" 1"x2" cage;
26—soldered pans.

May 5, 1953 No. 1525 3—18"x36" 1"x2" mesh
cages.

Nov. 18, 1953 No. 1986 3—18"x36" cages, $\frac{1}{2}$ x1"
mesh.

Nov. 23, 1953 No. 1996 51—Soldered pans (pans
for cage bottoms).

Dec. 5, 1953 No. 2013 24—Soldered pans.

Copies of the above invoices are attached hereto and marked Exhibits "D" through "H" in the order given above. [48]

All of the cages and pans referred to in the in-

voices had wire mesh cylindrical sides, bottom pans, and were in the proportions shown in Exhibit "C".

/s/ HARRY LACHMAN.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.
My Commission expires: Mar. 6, 1960. [49]

[Note: Exhibits are set out in Book of Exhibits.]

[Title of District Court and Cause.]

AFFIDAVIT OF SOLVEIG KENNEDY

State of California,
County of Los Angeles—ss.

Solveig Kennedy, first being duly sworn, deposes and says:

I reside at 17911 Welby Way, Reseda, California.

In the summer of 1954 I was employed in the office of Lynch Kirby Company, distributors of Kirby vacuum cleaners located at 522 North La Brea, Los Angeles, California. At the time I was working for the Lynch Kirby Company I was acquainted with Robert Kleid who was also employed by the Company.

One morning at the office of the above Company I saw a bird cage which was brought in by Robert Kleid who said that he had made it. It was a tall, cylindrical, open wire cage with a flat open wire top. It had upper and lower access doors in the side

wall [57] and had an open bottom which fitted into a black metal pan supported by three straight, iron legs which extended downwardly and outwardly from the bottom of the pan and were provided with rubber end pieces. In the cage was a piece of weathered tree branch which extended a substantial distance up in the cage from the bottom to serve as an ornamental perch.

This cage which I saw at Lynch Kirby Company had two parakeets in it at the time. I immediately decided that I wanted the cage and the birds and after talking to Robert Kleid, I purchased the cage with the birds in it for the sum of \$21.00.

I left the Lynch Kirby Company the third week of August, 1954. I remember this clearly because my husband and I then went on a vacation trip in the High Sierra. I purchased the cage and birds from Robert Kleid three months prior to the time I discontinued my employment with the Lynch Kirby Company and it was purchased about the second or third week of June, 1954.

On Monday, July 2, 1956, I was interviewed by Allan D. Mockabee concerning my acquisition of the cage and on that day I turned the cage over to him in return for another cage of a similar type. Until July 2, 1956, the cage in question has been constantly in my possession since its purchase from Mr. Kleid and has been continuously occupied by parakeets. The metal bottom pan has paint scratched from the side near the top of one of the legs, paint has come off the inside of the pan almost entirely around the edge of the bottom. At various

places on the wire side wall of the cage there are white markings from bird droppings and in the cage is a tree branch with dark brown bark, some of which has been removed on laterally extending branches. This branch is a replacement of the original one in the cage when I purchased it from Mr. Kleid. The original branch became soiled from droppings and the one now in [58] the cage was about ready for replacement because it is soiled.

/s/ SOLVEIG KENNEDY.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public. My Commission expires: Mar. 6,
1960. [59]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN JAMIESON

State of California,
County of Los Angeles—ss.

John Jamieson, first being duly sworn, deposes and says:

I am a resident of Los Angeles County, California, and I am employed by Harry Lachman, proprietor of The Patio Workshop, 11907 Wilshire Boulevard, Los Angeles, California.

I have been employed by Mr. Lachman for a period of approximately 10 years and I am thoroughly familiar with the articles on display at and sold from his show room at the above address, and also,

I am familiar with various types of articles which are manufactured, refurbished and stored in the work rooms at the same address and immediately behind the show room.

I have examined the photographs attached to the affidavit [60] of Harry Lachman and signed by him on the day of, 1956, in connection with the matter of Continental Cage Corporation vs. Pacific Cage and Screen Co., et al., said photographs being marked Exhibits "A" and "B" of Mr. Lachman's affidavit.

Exhibit "A" is a photograph of a bird cage which, to my knowledge, has been in the possession of Mr. Lachman at his place of business during the entire time I have been associated with him in business, or for approximately the past 10 years.

The cage of Exhibit "A" is a cylindrical cage which is tall compared to its diameter. It has a bottom pan supported by legs, a band about the lower side portion, horizontal rings intermediate the top and bottom, and a substantially flat top. The cage's side wall and top are made of small spaced filaments of wood, reed or the like and they are held in position by a bottom ring, vertically spaced intermediate rings and a central top member of wood. The vertical filaments and the vertically spaced rings which connect them give the appearance of an open-work side wall, the openings of which are vertically elongated.

The cage of Exhibit "B" is that of a very similar type. It is cylindrical, has the open-work effect and has a flat open-work top.

Having been familiar with various types of bird cages in connection with the business in which I am engaged, if the cages of Exhibits "A" and "B", and particularly Exhibit "A", are viewed at a reasonable distance, such as when displayed in a shop for sale, the general design of Exhibits "A" and "B" would appear to be that of design patent No. Des. 177,326 granted April 3, 1956 to Sidney Herman on a Bird Cage.

/s/ JOHN JAMIESON.

Subscribed and sworn to before this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.

My Commission expires: Mar. 6, 1960. [61]

[Title of District Court and Cause.]

AFFIDAVIT OF MICHAEL A. CAPOBIANCO

State of California,
County of Los Angeles—ss.

Michael A. Capobianco, first being duly sworn, deposes and says:

I reside at 2349 Castle Heights Avenue, Los Angeles 34, California, and I am the manager of The Coral Reef, a bird shop, located at Farmer's Market, Third and Fairfax, Los Angeles, Calif.

I have been shown a copy of United States design patent No. Des. 177,326 granted April 3, 1956, on "Bird Cage."

Cages of this general appearance and shape were known to me in the early part of 1954. On June of

1954 I took at least several cages on consignment from Herman Shapiro of Dealer's Manufacturing Company of Los Angeles. These cages were cylindrical and considerably [62] taller than their diameter. They were made of a wire mesh called hardware cloth and the cylindrical mesh cages rested in pans supported by legs of iron rod. They had flat tops of wire mesh. Some of these first hardware cloth cages from Dealer's Manufacturing Company were sold by me and some were returned, probably because they had become shopworn and soiled. I do not have a record of these first cages from Dealer's Manufacturing Company because they were left on consignment and also because there probably was some exchange credit when a short time later Mr. Shapiro furnished me with cages of smooth wire mesh with the openings taller than their width.

Prior to receiving and selling Mr. Shapiro's cages I bought some cages from Robert Kleid, a young fellow who made cages prior to July, 1954. These cages were made of hardware cloth with flat open-work tops. They were higher than they were wide, much in the proportions of the cage of the above identified design patent. The cage proper sat in a pan which was supported by iron legs and in each cage was a piece of manzanita which gave the appearance of a tree and furnished perches for birds in the cage. I clearly recall the hardware cloth material because it was rough and it was easy to scratch oneself on the rough edges where the hardware cloth had been cut to shape the cage. I also clearly recall the supporting pan and legs because

the legs were welded to the pan, the welding operation weakened the material of the pan sometimes and occasionally one of the legs would break through.

An inspection of my business records does not show the earlier purchases of cages from Robert Kleid. They do show a check stub No. 2902 dated July 7, 1954 for the purchase of two cages at \$9.95 a piece and they also show a check stub No. 2936 of July 30, 1954 for payment of \$21.80 to Robert Kleid for two of the cages. There is a stub numbered 2967 dated August 10, 1954 in the amount of \$32.85 for three cages; stub No. 2992 of October 17, 1954 in the [63] amount of \$40.95 for four cages and stub No. 3041 dated Sept. 15, 1954 in the amount of \$21.90 for three cages. These were all purchased from Robert Kleid.

I also purchased cages of the same type as those described in connection with Robert Kleid. My check stub No. 2892 dated July 15, 1954 in the amount of \$9.95 for one cage. This cage and the others purchased from Marvin Lulla were of the same general design as that of the above identified design patent except that they were made of hardware cloth which looked like the material in the cage top of said design patent. Check stub No. 2895 showed payment also on July 15, 1954 to Marvin Lulla of \$9.95 for one cage. I remember that I had made out check No. 2892 and later in the day I had a sale for another cage, so I made out the second check No. 2895 and gave them to Lulla that afternoon. Payment was made as the cages were sold

because I took them from Lulla on consignment. There is another check stub No. 2902 dated July 17, 1954, showing payment to Lulla of \$19.90 for two cages.

The first record I can find of payment to Mr. Shapiro of Dealer's Manufacturing Company is check stub No. 3057 dated Sept. 23, 1954, in the amount of \$108.00 in payment for six cages. My records further show that of these six cages, three were purchased Sept. 11, 1954, two were purchased Sept. 15, 1954 and one was purchased Sept. 18, 1954. These records relate to cages which were secured on invoiced purchases whereas the earlier cages which Dealer's Manufacturing Company furnished me were on consignment and, as I have stated, I do not have any record of them because some were returned and allowances were made in connection with the hardware cloth cages of Dealer's Manufacturing Company which were first furnished to me in about June of 1954 on a consignment basis.

In my sales books, most instances do not show cash sales but they do reflect some of the sales made for out of town shipment. Most of the cash sales are recorded on a register manifold which for [64] that period is rather inaccessible since it is stored at another location. My sales slips for out of town shipment include several during the summer of 1954. They were for cages of the general type shown in the above identified design patent and the type described by me as having been manufactured by one or more of Robert Kleid, Marvin Lulla or Dealer's Manufacturing Company. There is a record

of shipment of a cage to Chris Zimmerman, 215 Linden Place, New Milford, New Jersey on July 17, 1954 at a cost of \$21.90. On July 31, 1954, I shipped one of the cages to Dorothy Evans, 5170 LoGorce Drive, Miami Beach, Florida, at a cost of \$21.90. On August 21, 1954, I have, in my sales book for that period, a record of a sale to Mr. Hurst, 4931 Vista Del Monte, Sherman Oaks, California, of one of the cylindrical cages at a cost of \$21.90.

/s/ MICHAEL A. CAPOBIANCO.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said County and State.

My commission expires: Mar. 6, 1960. [65]

[Title of District Court and Cause.]

AFFIDAVIT OF HERMAN SHAPIRO

State of California,
County of Los Angeles—ss.

Herman Shapiro, being first duly sworn, deposes and says:

I reside at 2433 West Washington Boulevard, Los Angeles, California, and I am the proprietor of Dealer's Manufacturing Company, 1451 Toberman, Los Angeles, California, and I am engaged in the manufacture and sale of bird cages.

Early in 1954 I conceived the idea of a cylindrical, flat topped open wire cage of considerably greater height than its diameter, with a metal pan and

legs. I conceived this design of bird cage without having previously seen a cage of this particular type and shape.

In the month of June, 1954, I made five or six cages, using [66] hardware cloth, a wire screen-like material of about $\frac{3}{8}$ or $\frac{1}{2}$ " mesh. I purchased hardware cloth for these first five or six cages for cash at a hardware store and have no record of the purchase. These cages were sold during the month of July, 1954. They were placed with The Coral Reef, bird and pet shop at Farmers' Market, Third and Fairfax, Los Angeles, California on consignment. As I recall it, some were sold and others were returned because I had then begun the manufacture of cages of oblong wire mesh which was more attractive and less rough than the hardware cloth of which the first few cages were made.

Attached hereto and marked Exhibit "A" is a photograph of a cage made by me and my then partner Herman Newitz, who was in business with me from August, 1954 until March, 1956. The cage of Exhibit "A" was made of the more finished wire mesh as distinguished from the hardware cloth of the first five or six cages. It had a cylindrical shape and was considerably taller than its diameter. It rested in a pan which was supported by four iron rod legs and it had a flat wire mesh top. In the cage of Exhibit "A" was a simulated tree including an upright of rattan with branches of sika, a reed-like material. The original hardware cloth cages also had similar simulated trees in them.

In July of 1954 I began work on the securing of a wooden chuck with which to spin the bottom

pans from aluminum. Exhibit "B" is a paid invoice for a piece of 5-ply fir for a jig. This was purchased from Lounsberry and Harris, lumber dealers of Hollywood.

Exhibits "C" and "D" are paid bills from Pabu Rattan of Los Angeles dated July 30, 1954 and August 5, 1954, showing the purchase by me of bamboo and rattan poles and pieces of sika for cage trees.

Exhibit "E" is a sales slip from Art Westcott Company, dealers in cages and equipment for poultry and rabbits, of $\frac{1}{2}$ " by 1" mesh wire for making cages such as that shown in Exhibit "A." [67]

Exhibit "F" is a bill dated August 21, 1954 from R. L. Young of Los Angeles for work done primarily on the attempted production of a chuck for spinning the cage pans. Exhibit "G" is a paid invoice dated September 2 (the year is not given but it is in my records as a 1954 invoice) for the production of a turning chuck and the spinning of five sample parts or pans. Such a pan is shown in the attached photograph Exhibit "H," which shows the shiny spun aluminum pan and a somewhat different type of leg structure than that shown in the photograph Exhibit "A."

Exhibit "I" is another invoice from Pabu Rattan dated September 8, 1954 for rattan poles and sika (spelled seka in the invoice).

Exhibit "J" is a photostat copy of a paid invoice of Art Westcott Company dated September 24, 1954 for the purchase of $\frac{1}{2}$ " x 1" mesh wire and clips and clip pliers for use in making cages of the type shown in Exhibit "H," and subsequently for

making similar cages having slightly different details but generally embodying the design of Exhibit "H."

Exhibit "K" is a photostat copy of an invoice from Pacific Box and Salvage Company dated October 4, 1954 for 250 cartons which were used to ship the cages. Where delivery was made for local sale cartons were unnecessary. They were primarily used for out of town shipment.

Exhibit "L" attached hereto is a photostat copy of an invoice from Pabu Rattan dated October 6, 1954, for a rattan pole.

I first saw a cage made by Continental Cage Corporation of Los Angeles at a show at the Biltmore Hotel which took place September 24, 25 and 26, 1954, and this was the first time I had seen a Continental cage. I had been making and selling cages such as shown in Exhibits "A" and "H" since July, 1954, and I repeat that the cages made and sold by me were conceived by me and that shape and appearance was not secured from Continental Cage Corporation [68] or any other source.

/s/ HERMAN SHAPIRO.

Subscribed and sworn to before me this 3rd day of July, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public in and for said State and County.

My commission expires March 6, 1960. [69]

[Note: Exhibits are set out in Book of Exhibits.]

Proof of Service Attached. [82]

[Endorsed]: Filed July 9, 1956.

[Title of District Court and Cause.]

AFFIDAVITS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

In support of its Motion for Preliminary Injunction on file herein, Plaintiff submits the attached supplementary affidavits of John Graf and Maurice R. Lazarus.

Dated: At Los Angeles, California this 25th day of July, 1956.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [83]

AFFIDAVIT OF JOHN GRAF

State of California,
County of Los Angeles—ss.

I, John Graf, being duly sworn, depose and say that I reside at 11271 Sardis Avenue, Los Angeles 64, California.

I have known Sidney Herman, the patentee of United States Letters Patent, Design 177326, since 1947 when he was working with my wife in Milwaukee, Wisconsin, and have known him substantially continuously since that time, except for a two-year period between 1949 and 1951.

In April, 1954, I was engaged in selling Bibles and, as a side line, was conducting a parakeet breeding aviary which I had established in the Fall of 1953. I made a practice of fabricating my own aviaries, using various types of wire to do so.

In April, 1954 I went to the Olympic Salvage Enterprises which is a used equipment store at 525 Olympic Boulevard in Santa Monica, California, and I bought two metal pans of cylindrical configuration which were approximately five inches deep and which had a flange on the upper edge thereof. There were two lips on the outside to lift the pans.

The reason I bought these pans is that I was considering making another wire bird cage for my parakeets and in April, 1954, I completed a bird cage which consisted of these pans resting on the floor and a cylindrical wire housing. The construction I made was distinguishable from the Herman patent No. Des. 177,326 in that there were no legs on the pan, the wire was of entirely different configuration, there was no rim on top, nor was there the grid at the top of the cage within the rim.

In April, 1954 I completed the cage and about that time I went over to Sid Herman's apartment at 3228 Sawtelle Boulevard, Los Angeles 64, California, to borrow a pair of Cherry-dykes metal cutters. I went up to his apartment and asked his wife where he was and she said he was in the garage but told me she didn't want me to go into the [84] garage and acted very secretive about what Sid was doing in the garage. She mentioned that the garage door was open. I ignored her request not to enter the garage and went in and saw Sid Herman working on a cylindrical bird cage. He was shaping $\frac{5}{8}$ x $\frac{5}{8}$ " mesh wire into a cylindrical shape. He had at his side a pan which he intended to use which consisted of an old barbecue stand with legs thereupon.

When I saw the cage I laughed because it struck me as coincidental that Sid would be working on a cage at the same time that I was working on a cage. Up to this time, Sid Herman had not seen the cage that I had completed, nor did he have any knowledge of the fact that I was building a cage. He couldn't understand why I was laughing at him and I didn't tell him.

Subsequently to that time, approximately in May, 1954, I gave Sid Herman a parakeet and I remember this fact because parakeets were scarce and expensive and I knew that my wife wouldn't like my giving a bird to anyone for nothing, even though they were good friends of ours. This was true since I was selling birds at \$4.50 a head wholesale.

At the time he was fabricating the cage I saw in April, Sid had a round sheet metal top to close off the top of the cylindrical enclosure. After I saw him working on this cage, and about May, 1954, I again visited the Herman garage and saw Sid spraying another cage of the same type with black paint using a vacuum cleaner attachment to do so. He had a pan of the same design and a sheet metal top and I particularly remember this incident because he sprayed black paint all over the garage and his wife became angry and threw a hammer at him.

At this time, Mrs. Herman was not friendly to me because of the fact that I had previously ignored her request to not enter the garage in April, 1954 when I saw Sid making a cage which, to my knowledge, was the first cage he had built.

At this time, Sid Herman, to my knowledge, was working selling Kirby vacuum cleaners and he was somewhat difficult to get ahold of. Thus, while I frequently visited his apartment at short intervals, he was not always in and I did not see him very often. [85]

Later on when I saw a completed cage in his house, it was painted black and had a branch in it. The cage was of the same appearance and configuration as those he was previously working on in his garage.

On or about July, 1954, the Hermans lost the parakeet which I had given them in May, 1954 and I replaced the lost parakeet with a yellow male parakeet. To my knowledge, Sid Herman had had the cage in his house sometime previously to that date and had kept in it the first parakeet I had given him.

/s/ JOHN GRAF.

Subscribed and sworn to before me this 25th day of July, 1956.

[Seal] /s/ MIRIAM H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

AFFIDAVIT OF MAURICE R. LAZARUS

State of California,
County of Los Angeles—ss.

I, Maurice R. Lazarus, being duly sworn, depose and say that I am the President of Custom Cage Corporation, a California corporation, doing busi-

ness at 1832 S. Sepulveda Boulevard, Los Angeles 25, California.

I am the brother-in-law of Sidney Herman, the patentee of United States Letters Patent, Design 177,326 and have known him continuously since 1940.

I have engaged in the manufacture of bird cages substantially similar in design to that shown in the aforesaid patent since August, 1954.

Prior to August, 1954, and probably in July, 1954, Sid Herman, on a visit to his house, showed me a bird cage which was painted black, which had a tree branch disposed in the center of it and which was substantially similar, to the best of my recollection, to that bird cage shown in Design Patent No. 177,326.

In August, 1954, I gave Sidney Herman a check to make a more commercially feasible model of his cage. Sid told me that he had made the cage in his garage and suggested that we get together to manufacture the cage and sell the same. At all times he gave me the impression that he had developed and invented the cage and never indicated in any way that he had copied the cage from anyone else.

The cage that Sid Herman built with the money I gave him was identical with the cage shown in patent No. 177,326, was painted black and was displayed by Merchants Pet Supply at the Biltmore Hotel pet show in September, 1954.

I looked at every booth at the show in September,

1954 and, to my knowledge, there was not shown any cage whatsoever which resembled the cage being shown by us. This cage was ultimately taken down to Germaine's and placed in their window. [87]

At the time the cage was shown at the show in 1954, a sand blasted Manzanita branch was housed within the cage to serve as a perch for birds and as a decorative element.

To my knowledge, at that time Pacific Cage and Screen Co. was not engaged in the sale and distribution of cages of the design shown in United States Letters Patent No. Des. 177,326 and only came in a substantial time later with copies of the design of the patent.

Sidney Herman and I jointly engaged in the manufacture and sale of such cages from August, 1954 to December, 1954, and I have continued to this date.

/s/ MAURICE R. LAZARUS.

Subscribed and sworn to before me this 25th day of July, 1956.

[Seal] /s/ MIRIAM H. AULD,
Notary Public in and for the above County and
State. My Commission Expires Aug. 31, 1958.

Affidavit of Service by Mail Attached. [89]

[Endorsed]: Filed July 26, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: July 31, 1956. At: Los Angeles, Calif.

Present: Hon. Thurmond Clarke, District Judge.

Deputy Clerk: Ed. J. Fisher. Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings: Ruling on submitted matter:

It Is Hereby Ordered that the motion of the Plaintiff in the above named cases for preliminary injunction is granted.

Counsel for the prevailing party is directed to prepare and file appropriate order.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

By ED. J. FISHER,
Deputy Clerk. [90]

[Title of District Court and Cause.]

ANSWER

Defendants deny, admit and allege as follows:

1.

Defendants admit that plaintiff has a regular and established place of business at Culver City, California, but are without information as to fact and place of incorporation and therefore leave plaintiff to its proofs.

2.

Defendant Pacific Cage and Screen Co. admits the allegations of paragraph 2. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs thereon. [91]

3.

Defendant Pet Dealers Supply Company admits the allegations of paragraph 3 of the complaint. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs.

4.

Defendant Merchants Pet Supply Company admits the allegations of paragraph 4 of the complaint. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs.

5.

Defendant John Middelkoop admits the allegations of paragraph 5. The other defendants are without knowledge of the allegations thereof and leave plaintiff to its proofs.

6.

Defendants admit the allegations of paragraph 6.

7.

Defendants admit that United States Letters Patent No. Des. 177326 were issued to plaintiff on April 3, 1956, but deny that said Letters Patent were duly and legally issued. Defendants are with-

out knowledge that plaintiff now is the owner of said Letters Patent and leave plaintiff to its proofs.

8.

Defendants admit the allegations of paragraph 8.

9.

Defendant deny the allegations of paragraph 9.

For a Separate Answer and Defense to Said Complaint Defendants Affirmatively Allege As Follows:

10.

That the said Sidney Herman was not the original and first inventor or discoverer of any part of the alleged invention or improvement disclosed and claimed in said patent but that prior to November 1, 1954, and more than one year prior to said date said alleged invention was well known and used in the art, the following prior art being relied upon:

Prior Publications

Catalog No. 42, The Andrew B. Hendryx Co., 1930, pages 2a, 40, 49, 57 and 58,

Catalog, Pacific Coast Wire & Iron Works, August 1, 1938, page 11,

and other publications and disclosures which defendants are making search for and ask permission to present as soon as discovered.

11.

Defendants further aver that said patent No. Des. 177,326 is invalid because bird cages embody-

ing the features of the design disclosed in said patent were in public use and on sale in the United States for more than one year prior to the filing date of the application for said patent and in particular were manufactured and sold by Andrew B. Hendryx Co., Geo. H. Wahmann Mfg. Co. and others, and were shipped into the United States from China and used, sold and placed on sale by Harry Lachman of Los Angeles, California, and others, the names of whom defendants do not at present know but such names will be supplied by defendants upon determining them.

12.

That Sidney Herman, the applicant for the patent in suit, [93] purchased a cage embodying all of the substantial features of the design of said patent and subsequent to the purchase of said cage, said Sidney Herman made slight and unpatentable alterations in said design, making oath to said application and claiming all of the design as his invention and the patent therefore is void.

13.

That said patent in suit is invalid because it fails to describe and claim the alleged invention in "full, clear, concise and exact, terms required by the Patent Statutes, in that the description and claim of the patent fail to distinguish that portion of the design which said Sidney Herman considered to be new over the design of the cage which he purchased prior to his alleged invention of the design."

Wherefore, defendants pray that the complaint be dismissed and that they have judgment against plaintiff for their costs, disbursements and reasonable attorneys fees herein.

FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE,
Attorneys for Defendants. [94]

Affidavit of Service by Mail Attached. [95]

[Endorsed]: Filed Aug. 10, 1956.

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Continental Cage Corporation, Plaintiff, and Thomas P. Mahoney, attorney for Plaintiff;

You Are Hereby Notified and You Will Please Take Notice, that on Monday, September 10, 1956, at 2 P.M. in the courtroom of Hon. Thurmond Clarke, in the Federal Building at Los Angeles, California, defendants will present the attached Opposition to Plaintiff's Order for Preliminary Injunction.

FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE,
Attorneys for Defendants. [96]

[Title of District Court and Cause.]

OPPOSITION TO PLAINTIFF'S ORDER FOR PRELIMINARY INJUNCTION

Now come defendants through their counsel and oppose plaintiff's proposed Order for Preliminary Injunction.

The proposed order is vague and indefinite in that under paragraph one thereof, defendants are unable to ascertain what designs of cages are intended to be included therein.

In paragraph one no reference is made to the top of the cage, which is different in the patented design than in any of defendants' products. If defendants manufacture and sell a cage as defined in paragraph one with any type of top design, whether or not it was the top design of the patent in suit, defendants would be violating the injunction.

The design defined in paragraph one of the proposed order defines a bird cage, all of the features of which are embodied in [97] cages prior to plaintiff's patent. Thus, according to the showing clearly made by defendants, the proposed order and injunction would prevent defendants from manufacturing and selling that which is clearly in the public domain. If defendants are entitled to manufacture and sell the design features in the public domain, there should be some provision in the case permitting defendants to do so and a clear understanding as to which of defendants' cages are free of the

injunction. There are no findings of fact or conclusions of law and defendants find it impossible to interpret an order such as the one proposed by plaintiff.

The proposed bond of \$1,000.00 is entirely inadequate. Defendants introduced evidence showing that plaintiff's patentee was not the inventor of the design in suit and that he copied the overall and basic design from one Robert Kleid after purchasing a cage from said Robert Kleid and asking Kleid about how it was manufactured and where he secured certain elements of the cage.

Defendants are of the firm opinion that it can clearly prove that plaintiff's patentee was not the inventor of the design in suit and that the patent in suit is invalid. Defendants have already suffered loss as a result of circularizing of defendants' customers and the loss to defendants as the result of the grant of a preliminary injunction will be irreparable. It cannot be measured in terms of lost sales during the time the injunction is in effect. To this loss must be added the entirely expected loss of dealer customers because of the injunction. Defendants have no way of measuring the loss which might be suffered by reason of a preliminary injunction but it is submitted that a bond in the amount of \$50,000.00 is within reason and should be required if it should eventually be determined that the injunction was improperly granted or if the patent is held invalid upon trial on the merits.

The bond which plaintiff must post covers costs and damages. Title 28 U.S.C. Sec. 382; *Heiser v.*

Woodruff, 128 F. 2d. [98] 178 C.C.A. 10, 1942; Utah Radio Products v. Boudette, 69 F. 2d 973 C.C.A. 1, 1934; Robinson v. Benbow, 298 F. 561 C.C.A. 4, 1924.

A preliminary injunction must be issued on the basis of findings of fact and in the absence of any findings will be vacated on appeal. "There are several reasons why this case cannot be considered here on the merits. The 'preliminary mandatory injunction' was interlocutory in nature and was issued by the Court without findings of fact, which are specifically required by Rule 52." Hopkins v. Wallin, 13 Fed. Rules Serv. 52a.2, Case 1; 179 F. 2d 136 C.C.A. 3, 1949. In this case the Court of Appeals held that the preliminary injunction was issued by the Court without proper foundation.

In National Savings & Trust Co. v. Schutack, 139 F. 2d 371 US Ct. of Appeals, DC, 1943, the Court denied a petition for instructions without making any finding to support its action and the judgment of the Court was reversed and remanded with instructions to find the facts specially and state separately its conclusions of law.

In Bank of Madison v. Graber, 158 F. 2d 137 C.C.A. 7, 1946, it was held that findings of fact and conclusions of law must be made on the granting of an interlocutory injunction and recitals in the restraining order itself cannot take their place. The Court of Appeals stated "Admittedly, there was no attempt to comply with Rule 52a of the Federal Rules of Civil Procedure which requires: "* * * the Court shall find the facts specially and state sepa-

rately its conclusions of law thereon * * *; and in granting or refusing interlocutory injunctions the Court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action'." The question is whether the injunction in the instant case should be sustained in the absence of such findings and conclusions. This Court in *Shannon v. Retail Clerks' National Protective Association*, 128 F. 2d 553 (6 Fed. Rules Serv. [99] 52a.2, Case 10, reversed such an order in part at least for failure to comply with this rule. The Court referring to the rule, stated (page 555); " 'These are strongly worded mandatory provisions which should be respected. They are not meaningless words'."

/s/ ALLAN D. MOCKABEE,

Attorney for Defendants. [100]

Acknowledgment of Service Attached. [104]

[Endorsed]: Filed Aug. 10, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Continental Cage Corporation, Plaintiff, and
Thomas P. Mahoney, Attorney for Plaintiff:

You Were Hereby Notified and You Will Please
Take Notice, that on Monday, September 10, 1956,
at 2 P.M. the defendants, by their attorneys, will
present the attached Motion for New Trial of Order
Granting Preliminary Injunction, in the courtroom

of Hon. Thurmond Clarke, in the Federal Building at Los Angeles, California.

FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE,
Attorney for Defendants. [105]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL OF ORDER GRANTING PRELIMINARY INJUNCTION

Now come defendants, through their counsel and move the Court for a rehearing of plaintiff's Motion for Preliminary Injunction which is treated as a motion for new trial under Rule 59 F.R.C.P. The reasons therefor are given below.

Defendants opposed Plaintiff's Motion for Preliminary Injunction by affidavits and evidence attached thereto and defendants also had witnesses present in Court for the purpose of testifying in opposition to plaintiff's motion.

Plaintiff's counsel made a brief statement in support of its motion in which he charged that one of the bird cages manufactured by defendants, on exhibit in the Court, was an infringement of plaintiff's patent and plaintiff thereupon rested.

Defendants' counsel began a discussion of defendants' [106] position and briefly outlined that defendants had shown that plaintiff's patentee was not the inventor of the design in suit; that plaintiff's patentee had secured substantially all of what

was shown in his patent from another; that the statement of one of plaintiff's affiants had further substantiated the fact that plaintiff's patentee had "conceived a more commercially feasible model of his cage." This was in August, 1954, after plaintiff's patentee had purchased a cage containing all the major features of the design in suit from Robert Kleid. Defendants' counsel also called to the attention of the Court some of the numerous exhibits accompanying defendants' affidavits and also presented to the Court the file wrapper of the application for the design patent in suit.

At this point the Court terminated further hearing on the matter and stated that it would take it under submission. The next day the Court announced by letter that it had reached its decision to grant the preliminary injunction.

Plaintiff's counsel had available in Court the Presidents of both defendants Customcraft Industries, Inc. and Pacific Cage and Screen Co. in the two actions. These witnesses were prepared to testify that they did not design their cages from cages of plaintiff and to give other evidence which would have further strengthened defendants' showing that plaintiff's patentee was not the inventor of the design in suit.

Plaintiff's counsel was prepared to argue that among other requirements for the grant of a preliminary injunction there must be a showing of irreparable injury to the plaintiff. *Sims v. Greene* 161 F. 2d 87 C.C.A. 3, 1947. Plaintiff entered the field with its cages after others had pioneered the

field and subsequent to the time that such others began the manufacture and sale of cages of the patented design, rightfully believing that the cage was one that could not be protected by a valid patent. Plaintiff has been, under such circumstances, manufacturing and selling cages in [107] competition with others in the field and apparently has been successfully so doing. Denial of the preliminary injunction will not alter plaintiff's competitive position nor cause it any harm. The grant of the injunction before trial will cause injury to defendants which can to a certain degree be measured but it will result in damage which cannot be estimated but which may be far in excess of provable damage. Defendants have already suffered loss by reason of the circularizing of defendants' customers by plaintiff, some of which circularizing has not been only the notification that there was alleged patent infringement but written statements by plaintiff which are obviously untrue and which were made deliberately with the intent to entice away customers of defendants.

It is submitted that there is no reasonable basis for the grant of a preliminary injunction based upon the patent in suit. Where questions of fact are seriously disputed the matter will be left for final hearing. *Lare vs. Harper & Bros.* 86 Fed. 481, 483, C.C.A. 3; *E. I. Horsman and Etna Doll Co. v. Cauffman*, 286 F. 372, C.C.A. 2 Cert. Den. 261 US 615; *Decorative Stone Co. v. Building Trades Council*, 13 F. 2d 123 C.C.A. 2 Cert. Den. 277 US 594.

If the validity of a patent has been neither ad-

judicated nor acquiesced in by the public a preliminary injunction will not be granted. *National Cash Register Co. v. Remington Arms Co.*, 283 F. 196 DC Del. affirmed 286 F. 367 C.C.A. 3.

The patent in suit issued April 3, 1956, a little over two months before suit was filed. It obviously has not been adjudicated in any prior litigation and it is just as clear that there has been no long acquiescence of its validity by the industry.

A design patent is not the same as a regular mechanical patent wherein new mechanical functions and structures are involved, and to obtain a valid design patent is exceedingly difficult as pointed out by the Second Court of Appeals in *Charles D. Bridgell, Inc. v. Alglobe Trading Corp.* 92 USPQ 100.

The file wrapper of the application for the patent in suit, defendants' Exhibit A for identification, clearly shows that the United States Patent Office did not have available any evidence of prior invention such as that proposed by defendants or any evidence that plaintiff's patentee had purchased a cage containing in all patentable respects, the elements of the design in suit before plaintiff's patentee conceived the idea of utilizing the Kleid design with the wire mesh of the 1930 Hendryx catalog (Babros affidavit exhibits) and the top metal band of the Hendryx catalog of 1930 (Babros affidavit exhibits).

At the time of the hearing on the Motion for Preliminary Injunction counsel for defendants did not have an opportunity to discuss certain of the law regarding patentability. Some of these points are outlined below.

The prime requisite to the validity of a design patent is that it be the product of invention. It is not sufficient that the design be novel, ornamental or pleasing to the eye. *Tourneau v. Tishman & Lipp*, 100 USPQ 350 DC N.Y.

The same exceptional talent is required for a design as for a mechanical patent. *Cornick v. Stry-Lenkoff Co.*, 107 USPQ 207 DC Ky.

A design patent must disclose inventive originality in design and ornamentation. Mere mechanical skill is no more sufficient to constitute inventive art in the case of the design artist than in the case of the engineer. *Capex Company v. Swartz*, 166 F. 2d 5 C.C.A. 7; *Western Auto Supply Co. v. American-National Co.*, 114 F. 2d 711 C.C.A. 6; *Cavu Clothes v. Squires, Inc.*, 184 F. 2d 30 C.C.A. 6.

A design patent must be possessed of novelty. The adaptation of old devices to new purposes, however convenient or useful they may be in their new role, is not invention. *Western Auto Supply Co. vs. American-National Co.* Supra; *Imperial Glass Co. v. A. H. Heisey & Co.*, 294 F. 267 C.C.A. 6. [109]

All that plaintiff's patentee did was to take the old overall design of the cage which he purchased from Robert Kleid and added to it the specific shape of mesh shown in the Hendryx catalog cage of 1930 in the affidavit of Babros, the vertically elongated mesh appearance of the Chinese cages in the photographs in the affidavit of Lachman and the upper metal band of the 1930 Hendryx catalog cages in the affidavit of Babros. To this he also added a square

mesh top which is not found in any of the accused cages. Even this is shown to be old in the Hendryx catalog of 1930 above referred to.

The degree of difference required to establish novelty is such that it must be a new design and not a modified or already existing design. Application of Johnson 175 F. 2d 791 C.C.P.A.; Application of Abrams 205 F 2d 202 C.C.P.A.

As to the design novelty of providing a cylindrical wire cage with a bottom pan supported by three legs and a wire mesh flat top with a band about the top, reference is made to the accompanying affidavit of Allan D. Mockabee. Attached to the affidavit is page 8 of Geo. H. Wahmann Manufacturing Co. Catalog which shows cage LC-32 containing the design features referred to and a letter from C. Harry Wahmann dated July 2, 1956 addressed to the affiant. The letter states that cage LC-32 has been manufactured by Geo. H. Wahmann Manufacturing Co. since 1923; that cage LC-32/B which shows a deep bottom pan has been made since 1925; and that cage LC-139 which has a deep bottom pan flange and a separate pan in which the cage is supported has been manufactured since 1934.

The fact that a design may be distinguished from those found in the prior art does not import the required novelty and ornamentation. Its overall aesthetic effect must represent a step which has required inventive genius beyond the prior art. *Burgess Vibrocrafters v. Atkins Industries*, 204 F. 2d 311 C.C.A. 7.

Defendants, in their opposition to plaintiff's Motion for [110] Preliminary Injunction filed July 9, 1956, cite other law in support of their contention that a preliminary injunction should not be granted in a patent case unless the patent has previously been adjudicated and found valid; that a patent applied for by one who is not the inventor is void; where defendants' affidavits and exhibits raise issue as to validity and plaintiff's proofs fail to show public acquiescence.

Not only has defendant raised an issue as to validity with regard to non-inventorship and lack of invention and novelty, but when these issues were raised, plaintiff filed counter affidavits, neither of which overcame the issues raised by defendants and in fact the counter affidavit of Lazarus presented by plaintiff further substantiated defendants' position that plaintiff's patentee was not the inventor of the design in suit. It is highly significant that plaintiff did not originally furnish an affidavit from plaintiff's patentee and it is even more significant that in filing counter affidavits, plaintiff again failed to furnish an affidavit from plaintiff's patentee.

It is respectfully submitted that upon reconsideration of the several issues raised and proofs made by defendants, it will become apparent that the present case is far removed from that type of case upon which preliminary injunction is granted. The Federal Rules of Civil Procedure and the decisions of the courts have laid down definite rules and quali-

fications for the granting of a preliminary injunction and these rules and decisions completely support the defendants. Denial of the preliminary injunction is therefore requested.

/s/ ALLAN D. MOCKABEE,
Attorney for Defendants. [111]

[Title of District Court and Cause.]

AFFIDAVIT OF ALLAN D. MOCKABEE

State of California,
County of Los Angeles—ss.

Allan D. Mockabee, being duly sworn, deposes and says:

That he is one of counsel for defendants in the above entitled action.

That on June 28, 1956, affiant wrote to Geo. H. Wahmann Manufacturing Co., Baltimore, Maryland, asking if that company had any old catalogs showing animal cages such as those pictured in the attached photograph of page 8 found by affiant in the Wahmann catalog of September 1, 1954.

In response to the said letter of June 28, written by affiant, a reply was received and a photostat copy thereof is attached hereto. It is dated July 2, 1956, and states that the [112] Wahmann Company has no catalogs in stock earlier than the catalog of September 1, 1954. C. Harry Wahmann, the writer of the letter stated that he could testify that his company has been making cage No. LC-32 since

1923, cage No. LC-32/B since 1925 and cage No. LC-139 since 1934.

/s/ ALLAN D. MOCKABEE.

Subscribed and sworn to before me this 9th day of August, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public. My commission expires Mar. 6,
1960. [113]

[Note: Exhibits are set out in Book of Exhibits.]

Acknowledgment of Service Attached. [114]

[Endorsed]: Filed Aug. 10, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFEND-
ANTS' OPPOSITION TO PLAINTIFF'S
ORDER FOR PRELIMINARY INJUNC-
TION

Now comes plaintiff, through its attorney, and objects to defendants' opposition to plaintiff's proposed order for preliminary injunction.

The opposition to the order is based on the following grounds:

1. That the order is vague and indefinite in that defendants are unable to ascertain what designs of cages are intended to be included therein;

2. Defendants insist that specific reference should be made to the top of the cage because it is allegedly different in the patented design than in any of defendants' products;

3. That the proposed bond is entirely inadequate; and

4. That the defendants are of the opinion that it can clearly be proved that plaintiff's assignor was not the inventor of the design in suit. [118]

It should be pointed out that the defendants make no attempt to establish noninfringement of the patent in issue here and it is plaintiff's position that such a contention could not fairly be made in view of the manifest and flagrant infringement of the patent.

In considering the first contention of the defendants, it should be pointed out that the first paragraph of the order clearly defines the design of the cage which is the subject matter of the patent in issue specifying, as it does, the various design elements which are to be found in all of the infringing cages manufactured and sold by defendants.

In relying on the second contention, the defendants advert to the slight distinction between the showing in the patent drawing of the top of the cage and the tops of the defendants' cages. It is submitted that the Court had before it the cage manufactured and sold by the defendants and was able to view the cages during the argument by counsel for defendants. As a matter of fact, defendants' counsel pointed out the slight distinctions to the Court and showed the Court a copy of the patent in issue. It must be presumed, therefore, that the Court made its order granting the preliminary injunction with this slight difference in mind.

As will be shown in the appended memorandum

of points and authorities, the law is well established that slight variations between the design of the patent and the design of the infringing product do not avoid infringement.

Considering the third contention of the defendants relating to the bond, it is manifest from the decisions of the courts that the amount of the bond is entirely within the discretion of the Court and that the Court, if it desires, can refuse to grant any bond whatsoever. The attempt of the defendants to persuade the Court to establish a bond in the sum of Fifty Thousand Dollars (\$50,000.00) is based upon no affidavits as to the present manufacture and sale of the infringing articles by the defendants and it is submitted that the bond prescribed by the Court [119] is adequate in the premises.

So far as defendants' opinion as to the prior inventorship of the invention in suit by the plaintiff's assignor is concerned, it is manifest that the Court had before it the alleged prior structure manufactured by Robert Kleid and also had before it the affidavits supporting the prior inventorship by plaintiff's assignor. Therefore, it is submitted that the Court has thoroughly considered this question and there is no basis for objection to the order by defendants.

Dated: At Los Angeles, California this 17th day of August, 1956.

/s/ THOMAS P. MAHONEY,

Attorney for Plaintiff. [120]

Affidavit of Service by Mail Attached. [125]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S OBJECTIONS TO DEFENDANTS' MOTION FOR NEW TRIAL

Now comes the plaintiff, through its attorney, and opposes defendants' motion for new trial.

The Court, in its hearing on plaintiff's motion for preliminary injunction, had before it the following:

1. A copy of the file history of the patent in issue together with the references cited by the United States Patent Office in initially rejecting the application upon which the patent is based;
2. A copy of the patent in issue;
3. An example of the bird cage manufactured and sold by plaintiff in accordance with the teachings of its patent;
4. A bird cage manufactured and sold by defendants;
5. Also present in the courtroom was an alleged anticipatory bird cage assertedly manufactured in accordance with the alleged prior invention of Robert Kleid. [126]

In the affidavits submitted in support of the motion for preliminary injunction were assertions that irreparable harm was being caused to plaintiff by the infringing acts of defendants and in the Otis affidavit of July 6, 1956 were averments that the cage of the patent was the mainstay of plaintiff's business, while it was apparent from the exhibits submitted by the defendants that they were engaged in the sale of many other types of cages. There-

fore, plaintiff has obviously made a showing of irreparable harm.

It is submitted that the Court, by virtue of its consideration of all of the matters set forth hereinabove, was justified in its ruling for preliminary injunction and that no new bases have been set forth by the defendants which would compel the Court to grant a new hearing to defendants on defendants' motion for new trial.

As evidenced by the appended memorandum of points and authorities, the Court, given the opportunity to review the evidence before it in its original hearing, had the discretion to grant plaintiff's motion. Therefore, it is earnestly submitted that defendants' motion for a new trial should be denied.

Dated: At Los Angeles, California this 17th day of August, 1956.

/s/ THOMAS P. MAHONEY,
Attorney for Plaintiff. [217]

Affidavit of Service by Mail Attached. [132]

[Endorsed]: Filed August 21, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF JOSEPH H. BABROS

State of California,
County of Los Angeles—ss.

Joseph H. Babros, being first duly sworn, deposes and says:

I am the President of the defendant Pacific Cage

and Screen Co. and am a resident of Los Angeles County, California.

Based upon an estimated monthly average of sales of the "Coronado" bird cage produced by Pacific Cage and Screen Co. and accused by plaintiff as an infringement of its design patent No. Des. 177,326, it is estimated that the gross received for the manufacture and sale of said "Coronado" cages during the year 1955 was in the neighborhood of One Hundred and Fifty Thousand Dollars (\$150,000.00).

Attached hereto is a report from Dun and Bradstreet which was received by me directly from that firm and shows that plaintiff's [133] financial condition is very poor and plaintiff would be unable to pay damages which might result in the event a preliminary injunction is granted against defendants and the merits of plaintiff's action are found to be groundless.

/s/ JOSEPH H. BABROS.

Subscribed and sworn to before me this 6th day of September, 1956.

[Seal] /s/ HELEN WEIGHTMAN,
Notary Public. My Commission Expires March 6,
1960.

[Endorsed]: Filed Sept. 10, 1956. [134]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Sept. 13, 1956. At: Los Angeles, Calif.
Present: Hon. Thurmond Clarke, District Judge.
Deputy Clerk: E. J. Fisher. Reporter: None.
Counsel for Plaintiff: No appearance.
Counsel for Defendant: No appearance.
Proceedings: Ruling on submitted matter:

It Is Hereby Ordered that order of July 31, 1956, allowing issuance of Preliminary Injunction, to stand, after hearing motion of defendants and objections thereto on Sept. 10, 1956.

Counsel notified.

JOHN A. CHILDRESS,
Clerk,

By E. J. FISHER,
Deputy Clerk. [135]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on before the Honorable Court on Defendants' Opposition to Plaintiff's Order for Preliminary Injunction, and Defendants' Motion for New Trial of Order Granting Preliminary Injunction, the Court does make the following findings of fact and conclusions of law:

Findings of Fact

I.

This is a suit under the patent laws of the United States charging defendants with infringement of United States Letters Patent No. Design 177,326 issued to Sidney Herman for "Bird Cage".

II.

The plaintiff Continental Cage Corporation is the owner of legal title to the patent in suit.

III.

The defendants, Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop, are residents of Los Angeles County, California. [136]

IV.

The bird cages manufactured and sold by defendant Pacific Cage and Screen Co. and sold by Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop which the plaintiff alleges infringe the patent in suit here, were exhibited to the Court on plaintiff's motion for preliminary injunction. On the hearing for preliminary injunction, defendants' counsel presented to the Court a copy of the patent in issue and a copy of the file wrapper thereof.

Also presented to the court was an allegedly anticipatory structure manufactured by one, Robert Kleid.

V.

On plaintiff's motion for preliminary injunction, defendants responded vigorously with contentions of invalidity based on prior invention.

VI.

Defendants also based their avoidance of the charge of infringement of the patent on various minute differences between the alleged infringing structures and the showings of the patent.

VII.

The cage shown and claimed in the Herman patent in suit is constituted by an elongated cylindrical enclosure, said enclosure being defined by a plurality of vertical rods maintained in operative relationship with each other by relatively widely spaced, horizontally oriented rings. The top of the cage is surmounted by a sheet metal flange which depends below the top of the cylinder and encloses the same and which extends at right angles to the depending flange. The bottom of the cage is constituted by a sheet metal pan in which the lower end of the cylinder rests and said sheet metal pan is disposed in spaced relationship with the surface upon which the cage rests by means of a plurality of legs secured to the sheet metal pan.

VIII.

It is apparent from the affidavits of the parties and arguments of counsel that the cage of the invention has, in a short time, attained a [137] sur-

prisingly dominant economic position in the bird cage field by virtue of its novel appearance and unusual attractiveness of design. As a matter of fact, the cage of the patent achieves a surprisingly novel design by a combination of elements found in the prior art but not previously assembled in the distinctive manner exemplified and shown in the patent in suit.

IX.

The infringing cages manufactured and sold by defendants include an elongated cylindrical enclosure, said enclosure being defined by a plurality of vertical rods maintained in operative relationship with each other by relatively widely spaced, horizontally oriented rings. The top of the infringing cages is surmounted by a sheet metal flange which depends below the top of the cylinder and encloses the same and which extends at right angles to the depending flange. The bottom of the infringing cage is constituted by a sheet metal pan in which the lower end of the cylinder rests and said sheet metal pan is disposed in spaced relationship with the surface upon which the cage rests by means of a plurality of legs secured to the sheet metal pan. The distinctions in appearance between defendants' infringing cages and that shown in the patent are of a minor nature and such as to be incapable of permitting an ultimate consumer to adequately distinguish defendants' cages from those manufactured in accordance with the teachings of plaintiff's patent.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter of this action and the parties hereto.

II.

Plaintiff is entitled to a preliminary injunction whereby defendants, and each of them, are enjoined during the pendency of this action against manufacturing and selling infringing cages of the character set forth in the Order previously filed by plaintiff and as set forth in the Writ of Injunction filed simultaneously therewith. [138]

III.

The bond set by the Court is adequate in the premises.

IV.

Writ of Injunction shall issue forthwith.

Dated: Sept. 27, 1956.

/s/ THURMOND CLARKE,
Judge. [139]

Acknowledgment of Service attached.

[Endorsed]: Lodged Sept. 20, 1956. Filed Sept. 27, 1956.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Now come the defendants through their counsel and notify the plaintiff that hearing on defendants'

objections to plaintiff's Proposed Findings of Fact and Conclusions of Law will be had in the courtroom of Judge Thurmond Clarke, Federal Building, Los Angeles, California, on Monday, October 22, 1956, at 10:00 a.m. or at such time thereafter as the court may designate.

Defendants object to plaintiff's Proposed Findings as follows:

I.

Regarding proposed finding IV of plaintiff, line 8, after "thereof" should be added—, the file wrapper having been accepted by the court without discussion thereof by counsel for either party—; line 10, after "Kleid" should be inserted—which was not retained by the court when it took the matter of the preliminary injunction under advisement—. [140]

Finding IV of plaintiff is objected to since it implies that the file wrapper of the patent of plaintiff was in some way discussed by counsel or otherwise presented to the court whereas in fact there was no discussion of the file wrapper.

Finding IV is further objected to because it does not show that the Robert Kleid cage was not retained by the court when it took the matter of the injunction under advisement.

II.

Proposed finding V is objected to. The word "vigorously" in line 13 does not truly set forth the situation as it occurred. Defendants were given but a short time to present remarks regarding the Mo-

tion for Preliminary Injunction and no opportunity was had to present many of the points which, as defendants stated in the hearing on the Motion for Re-hearing, defendants' counsel was not given the opportunity to present at the first hearing.

III.

Finding VI is objected to since it should be supplemented by the addition of —and defendants also maintained that there was as much difference between the accused structure and the patent as there was difference between the patent and the prior art—.

IV.

Finding VII is objected to on the ground that in lines 22 and 23 where it states that the sheet metal flange depends below the top of the cylinder and “encloses the same” is ambiguous if not mis-descriptive. The inference is that the sheet metal flange completely closes the end of the cylinder. Actually, its vertical portion lies about the upper end of the side wall of the cylinder and does not enclose the cylinder. It might be stated that it encircles the end of the cylinder.

Further objection to proposed finding VII is based upon the fact that it completely leaves out any definition of the top of the [141] cage. The top, in the Herman patent, is of small square wire mesh and it is not made of the same material as the cylinder side wall.

With further reference to proposed finding VII, the legs should be more particularly described in re-

lation to their connection with the pan. In the proposed wording, there is the implication that the patent in suit would cover a planter cage wherein a planter pan is disposed below the cylinder supporting pan.

IV.

Proposed finding VIII is objected to on the ground that there has been no proof submitted that the cage of the patent in suit, according to the showing in the drawing, has been manufactured and sold or that any efforts of plaintiff in the production and sale of bird cages has caused the design of the Herman patent to attain any degree of economic dominance in the bird cage field.

Proposed finding VIII further is objected to on the ground that practically in its entirety the combination of elements is found in the prior art and previously assembled in the manner exemplified and shown in the patent in suit.

V.

Proposed finding IX is objected to on the ground that all of the features recited therein are found in the prior art and therefore cannot be a basis for a finding of infringement. Furthermore, this proposed finding does not include any top design whatsoever and the sheet metal flange does not enclose the cylinder as stated in the finding.

Furthermore, the finding, in the last sentence thereof, should include a statement to the effect that the distinctions between the patented cage and the prior art are not greater than the distinctions be-

tween the accused structure and the design of the patent. [142]

Conclusions of Law

I.

Proposed conclusion II is objected to on the ground that the definition of the structure of the design infringed as set forth by plaintiff is far too inclusive and indefinite to permit defendants to determine its extent.

II.

Conclusion III is objected to. Plaintiff is an insolvent corporation. Defendants are responsible manufacturers and the damages they will suffer by reason of the grant of a preliminary injunction clearly will be greater than the amount of the One Thousand Dollar (\$1,000.00) bond. In a circumstance such as this defendants cannot recover from plaintiff damages exceeding the amount of the bond. The bond was set without any hearing as to what a reasonable bond should be and a subsequent showing by defendants clearly indicates that a considerably higher bond should in all equity be required.

III.

Conclusion IV is objected to on the ground that the patent in suit has never been adjudicated valid, there has been no acquiescence in its validity by the trade, there is a serious question of fact in the case with regard to validity and there is another serious question of fact as to whether the patentee is in fact the inventor of the cage and whether he know-

ingly executed his Oath in his patent application with the full knowledge that he was not the inventor thereof.

/s/ ALLAN D. MOCKABEE,

Counsel for Defendants. [143]

Affidavit of Service by Mail attached. [144]

[Endorsed]: Filed Sept. 28, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The defendants Pacific Cage and Screen Co.; Pet Dealers Supply Company; Merchants Pet Supply Company; and John Middelkoop hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order of the United States District Court, Southern District of California, Central Division, of July 31, 1956, which was affirmed and entered after rehearing on September 13, 1956, after hearing on motion of defendants for rehearing on September 10, 1956, said order directing that a preliminary injunction issue against said defendants.

This appeal is taken under the provisions of Title 28 United States Code, Section 1292.

A cash bond for costs in the amount of Two Hundred and Fifty Dollars (\$250.00) is posted concurrently with the filing of this Notice of Appeal.

/s/ ALLAN D. MOCKABEE,

Attorney for Defendants. [145]

[Endorsed]: Filed Oct. 2, 1956.

[Title of District Court and Cause.]

STATEMENT OF DEPOSIT OF CASH BOND

The defendants, Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company and John Middelkoop, having filed a Notice of Appeal from the United States District Court for the Southern District of California, to the Court of Appeals for the Ninth Circuit in the above entitled action, there is deposited herewith with the Clerk the sum of Two Hundred Fifty (\$250.00) Dollars in the form of a certified check, as cash bond on appeal required under Rule 73(c).

The owner of said sum of Two Hundred Fifty Dollars is the defendant Pacific Cage and Screen Co. The condition of the bond is to secure the payment of costs if the appeal is dismissed or the judgment affirmed or of such costs as the Appellate Court may award if the judgment is modified.

The said sum is hereby subjected to the provisions of Local [146] Rule 8(c).

/s/ ALLAN D. MOCKABEE,
Attorney for Defendants-
Appellants.

State of California,
County of Los Angeles—ss.

Personally appeared before me, Allan D. Mockabee, known to me to be the attorney for the defendant in the above entitled action and acknowl-

and John Middelkoop having been represented by counsel,

It Is Ordered:

I.

That a writ of injunction be issued herein restraining and enjoining the defendants, Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop, their officers, agents, directors, attorneys, and all persons in privity with them, or any of them, until the further order of this Court, from:

1. Making, using, or selling bird cages which infringe United States Letters Patent, Design 177,326 and which include an elongated, cylindrical body provided with a plurality of spaced cylindrical [148] rods maintained in operative relationship with one another by widely spaced horizontally oriented rings, said body being supported at its lower extremity in a relatively deep sheet metal pan which, in turn, is supported upon three wrought iron legs, and said body being provided at its upper extremity with a sheet metal ring or cap having a cylindrical depending flange and a horizontally oriented flange overlying the top of the body.

2. Making, using or selling Coronado model bird cages presently being manufactured by Pacific Cage and Screen Co. and being sold through Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop.

II.

That a bond of One Thousand Dollars (\$1,000.00) be posted as a requirement for the issuance of this Preliminary Injunction by this Court to make good to defendants Pacific Cage and Screen Co., Pet Dealers Supply Company, Merchants Pet Supply Company, and John Middelkoop any damages which they may prove that they have suffered by reason of the issuance of said injunction if it shall eventually be held that said injunction was improvidently granted.

It Is So Ordered:

Dated: Aug. 31, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

Above order signed October 5th, 1956 nunc pro tunc as of August 31, 1956.

/s/ THURMOND CLARKE.

Disapproved as to form. Objections to be filed in three days.

/s/ ALLAN D. MACKABEE,
Attorney for Defendants.

August 6, 1956. [149]

[Endorsed]: Lodged Aug. 7, 1956. Filed Aug. 31, 1956. Nunc Pro Tunc Oct. 5, 1956. Docketed and Entered Oct. 5, 1956.

[Title of District Court and Cause.]

APPLICATION FOR ORDER FIXING THE AMOUNT OF SUPERSEDEAS BOND

The defendants having filed their notice of appeal from the order for preliminary injunction entered herein on October 2, 1956, and having posted a cash bond in the amount of Two Hundred Fifty Dollars (\$250.) concurrently therewith, now make application to the Court for a supersedeas bond staying the preliminary injunction pending the appeal and apply to the Court for an order fixing the amount of said bond in accordance with Rule 73(d).

/s/ FRED H. MILLER,
Attorney for Defendants.

ORDER

Upon the foregoing application, It Is Hereby Ordered that the preliminary injunction issued herein be stayed pending the defendants' appeal upon the posting by the defendants of a bond in the amount of One Thousand Dollars [151] (\$1,000.) conditioned for the satisfaction of the judgment in full, together with costs, interests, and damages for delay if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interests, and damages as the Appellate Court may adjudge and award, said stay to continue in effect until such time as the mandate of the Appellate

Court is spread upon the minutes of this Court or defendants' appeal is otherwise terminated.

Dated: This 19th day of October, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

[Endorsed]: Filed Oct. 22, 1956.

[Title of District Court and Cause.]

STIPULATION DESIGNATING CONTENTS
OF RECORD ON APPEAL

Pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, the parties hereto, through their counsel, hereby designate for inclusion in the Record on Appeal to the United States Court of Appeals for the Ninth Circuit, taken by Notice of Appeal filed October 2, 1956, the following portions of the record, proceedings and evidence in this action:

1. The Complaint,
2. The Answer,
3. Plaintiff's Motion for Preliminary Injunction,
4. Affidavit of Robert M. Otis in Support of Plaintiff's Motion for Preliminary Injunction,
5. Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction, [153]
6. Affidavit of Robert Kleid,
7. Affidavit of Joseph H. Babros and attached Exhibits A through A-5, B, C, C-1, D and D-1,
8. Affidavit of Harry Lachman with Exhibits A through H,

9. Affidavit of Solveig Kennedy,
10. Affidavit of John Jamieson,
11. Affidavit of Michael A. Capobianco,
12. Affidavit of Herman Shapiro with Exhibits A through L.
13. Copy of Design Patent Des. 177,326 of April 3, 1956, to Sidney Herman on "Bird Cage", the patent in suit,
14. Photograph of Plaintiff's Commercial Structure,
15. Photograph of Defendants' Accused Structure,
16. Photograph of Cage of Robert Kleid,
17. File Wrapper of Patent in Suit Including Prior Art References Cited by Patent Office,
18. Supplementary Affidavit of Robert M. Otis of July 6, 1956,
19. Affidavit of James S. Hanks of July 6, 1956,
20. Affidavit of George J. Meyer of July 6, 1956,
21. Affidavit of Albert A. Ardmore of July 6, 1956,
22. Affidavit of John Graf of July 25, 1956,
23. Affidavit of Maurice R. Lazarus of July 25, 1956,
24. Order for Preliminary Injunction,
25. Opposition to Plaintiff's Order for Preliminary Injunction,
26. Plaintiff's Objections to Defendants' Opposition to Plaintiff's Order for Preliminary Injunction,
27. Minute Order for Preliminary Injunction, July 31, 1956,

28. Motion for New Trial of Order Granting Preliminary Injunction.

29. Affidavit of Allan D. Mockabee of August 9, 1956, including letter of Geo. H. Wahmann Manufacturing Co., July 2, 1956 and page 8 of Wahmann catalog of Sept. 1, 1954, [154]

30. Plaintiff's Opposition to Defendant's Motion for a New Trial,

31. Minute Order, U. S. District Court, September 13, 1956, Affirming Order for Preliminary Injunction,

32. Findings of Fact and Conclusions of Law,

33. Opposition to Findings of Fact and Conclusions of Law,

34. Affidavit of Joseph H. Babros September 6, 1956,

35. Notice of Appeal,

36. Statement of Deposit of Cash Bond,

37. Application for Order Fixing the Amount of Supersedeas Bond,

38. Statement of Deposit of Cash Supersedeas Bond.

It is stipulated by and between the parties hereto, through their attorneys, that the plaintiff shall pay for the cost of printing only Items 4, 13 and 18 through 23 inclusive, as set forth hereinabove.

Dated this 5th day of November, 1956.

/s/ THOMAS P. MAHONEY,
Attorneys for Plaintiff.

/s/ ALLAN D. MOCKABEE,
Attorneys for Defendant. [155]

[Endorsed]: Filed Nov. 6, 1956.

[Title of District Court and Cause.]

CONCISE STATEMENT OF
POINTS ON APPEAL

Defendants-Appellants make the following statement of points on which they intend to rely on appeal:

That the trial court erred in each of the following respects:

1.

In granting a preliminary injunction on a newly issued design patent which has never been adjudicated or acknowledged to be valid by any one.

2.

In granting a preliminary injunction where defendants presented a serious and disputed question of fact to the effect that the patentee of the design patent in suit was not the inventor and that said patentee had actual knowledge that he was not the [159] inventor at the time he made application for the patent in suit.

3.

In granting a preliminary injunction where there was presented a serious question of fact as to the validity of the design patent in suit, based upon anticipatory prior art not considered by the Patent Office in granting the design patent.

4.

In summarily ordering defendants to cease the manufacture and sale of the accused design of bird

cage by preliminary injunction and permitting plaintiff, a company in poor financial condition, to post an entirely inadequate bond.

5.

In wording the preliminary injunction too broadly.

Dated in Los Angeles, California, this Ninth day of January, 1957.

HAZARD & MILLER,
FRED H. MILLER,
ALLAN D. MOCKABEE,

/s/ By ALLAN D. MOCKABEE. [160]

Affidavit of Service by Mail attached. [161]

[Endorsed]: Filed Jan. 9, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the Above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 161, inclusive, containing the original

Complaint;

Affidavits in Support of Plaintiff's Motion for Preliminary Injunction;

Opposition to Plaintiff's Motion for Preliminary

Injunction; (together with affidavits in support thereof & exhibits);

Additional Affidavits in Support of Plaintiff's Motion for Preliminary Injunction;

Answer;

Notice of Hearing of Opposition to Plaintiff's Order for Preliminary Injunction;

Notice of Motion for New Trial of Order Granting Preliminary Injunction;

Plaintiff's Objections to Opposition to Plaintiff's Order for Preliminary Injunction;

Plaintiff's Objections to Defendants' Motion for New Trial;

Affidavit of Joseph H. Babros;

Findings of Fact and Conclusions of Law;

Objections to Findings of Fact & Conclusions of Law;

Notice of Appeal;

Order for Preliminary Injunction;

Application for Order Fixing The Amount of Supersedeas Bond;

Stipulation Designating Contents of Record on Appeal;

Order Extending Time for Filing Record and Docketing Appeal;

Stipulation Extending Time for Filing Record and Docketing Appeal;

Concise Statement of Points on Appeal; and a full, true and correct copy of the Minutes of the Court on July 31, 1956; September 13, 1956;

B. Exhibits: File Wrapper and Contents of Design Patent #177,326, granted April 3, 1956.

Drawing of Design #177,326

Photograph of Plaintiff's Commercial Structure

Photograph of Cage of Robert Kleid

Photograph of Defendants' Accused Structure.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of said District Court, this 25th day of February, 1957.

[Seal] JOHN A. CHILDRESS,

/s/ By CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15454. United States Court of Appeals for the Ninth Circuit. Pacific Cage and Screen Co., a corporation, Pet Dealers Supply Company, a corporation, Merchants Pet Supply Company, a corporation and John Middelkoop, Appellants, vs. Continental Cage Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 26, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15454

PACIFIC CAGE AND SCREEN CO., a corporation; PET DEALERS SUPPLY COMPANY, a corporation; MERCHANTS PET SUPPLY COMPANY, a corporation; and JOHN MIDDELKOOP, Appellants,

VS.

CONTINENTAL CAGE CORPORATION, a cor-
poration, Appellee.

ADOPTION OF STATEMENT AND
DESIGNATION IN RECORD

Appellants hereby adopt the statement of points on appeal and stipulated designation of record appearing in the typewritten record.

/s/ ALLAN D. MOCKABEE,
Attorney for Appellants.

[Endorsed]: Filed March 1, 1957. Paul P. O'Brien, Clerk.

No. 15,456

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate of
Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLIDATED
DISTRIBUTORS, INC., a corporation,

Appellees.

BRIEF OF APPELLEE
BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION.

HARVEY H. BECHTEL,

1200 Broadway, Oakland 12, California,

Attorney for Appellee

*Bank of America National Trust
and Savings Association.*

LEDGER D. FREE, JR.,

JAMES R. DRUMWRIGHT,

300 Montgomery Street,

San Francisco 4, California,

Of Counsel.

FILED

SEP 20 1957

PAUL R. GILLESPIE, CLERK

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No. 15,456

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOSEPH L. JOY, Trustee of the Estate of
Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLIDATED
DISTRIBUTORS, INC., a corporation,

Appellees.

**BRIEF OF APPELLEE
BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION.**

I.

STATEMENT OF JURISDICTION.

This is an appeal by the Trustee in Bankruptcy from an order of the District Court reversing, in part, an order made by the Referee in Bankruptcy determining the nature, extent and validity of liens claimed by the Bank of America National Trust and Savings Association upon certain rotary scrapers

under statutory trust receipts. This Court has jurisdiction under the provisions of 11 U.S.C.A., Section 47, Subsection a, and General Orders in Bankruptcy 36 and 37, 11 U.S.C.A. following Section 53. The amount in controversy exceeds \$500.00.

II.

STATEMENT OF QUESTION PRESENTED.

The ultimate question presented by this appellate proceeding is solely whether the provisions of Section 3440 of the California Civil Code, requiring a sale of personalty to be accompanied by an actual and continued change of possession of the personal property sold, can operate to invalidate trust receipt security transactions carried out in conformity with the Uniform Trust Receipts Law.

III.

STATEMENT OF FACTS.

Miller Scraper & Mfg. Co., Inc. (hereinafter referred to as "Miller"), is a corporate successor to Kenneth L. Miller, doing business as Miller Scraper Co. Miller was at all times herein referred to engaged in the business of manufacturing farm equipment, including a certain type of rotary scraper. Its plant was located near Selma, Fresno County, California.

On March 20, 1952, Miller entered into an agreement to sell all the scrapers it manufactured to In-

Industrial Equipment Co., Inc., a corporation subsequently known as Consolidated Distributors, Inc. (hereinafter referred to as "Consolidated"). Said agreement, as amended and supplemented by a later agreement (Tr. pp. 204-213), dated April 4, 1952, provided, so far as pertinent to this proceeding, as follows:

"The Distributor [Consolidated] agrees to accept all production upon completion at the Yard of the Manufacturing Plant for the Manufacturer [Miller]; the Manufacturer and Distributor agree that all manufactured items are to be delivered to the Distributor F.O.B. Carrier at Selma, California, or are to be stored and/or warehoused at the Yard of the Manufacturer at the direction of the Distributor, and that, in either event, title thereof shall pass to the Distributor upon the occurrence thereof. * * *"

Pursuant to said agreement, Consolidated set up a selling organization, distinct and separate from Miller (Tr. pp. 59-60, 79-81, 99), and rented an office in a portion of an office building located on the four-acre lot of ground which made up the Miller premises. There was a sign, approximately twelve by thirty-six inches large, on the front of this building indicating in letters three inches high that this was the office of Consolidated (Tr. pp. 60, 101). Delivery of the scrapers by Miller to Consolidated began on or about April 1, 1952 (Tr. p. 85). A storage lot of approximately one acre in size comprising the southeast corner of the Miller land was graded and set aside as the place where Consolidated was to keep its scrapers.

As each scraper was parked by Miller on Consolidated's lot, it was immediately inspected by Consolidated and accepted or rejected, depending upon whether any mechanical defects were discovered (Tr. p. 87).

On the 1st and 15th of every month, Miller sent an invoice, made out to the Bank of America (hereinafter referred to as "Bank") to Consolidated. The invoice listed the particular scrapers that had been sold and delivered to Consolidated during that period. Consolidated in turn listed each scraper delivered and accepted by model, serial number, etc., on a statutory form of trust receipt (Tr. pp. 87-97). Consolidated took Miller's invoice with the accompanying trust receipt to Bank at its Selma Branch. Immediately upon delivery of the trust receipts to it, the Branch credited Miller's account with a sum equal to 90% of the invoice price of each scraper listed on the trust receipt.

Thereafter Consolidated sold the scrapers in the regular course of its business, upon notice to Bank and accounted to Bank for the proceeds of any such sale pursuant to the terms of the trust receipts. Bank and Consolidated properly filed the required statutory notice of trust receipt financing (Tr. pp. 48-49). All forty-two scrapers involved in this proceeding, which remained unsold at the time Miller was adjudicated a bankrupt in August, 1954, had been so produced, delivered, accepted, and placed under trust receipt prior to March 31, 1953.

In 1953, Miller defaulted in the payment of certain moneys loaned by Consolidated to Miller, resulting in several actions at law by Consolidated against Miller to collect the same. These accounts were settled by written agreement dated December 23, 1953, wherein Miller agreed to sell the scrapers remaining on Consolidated's lot and to account for the proceeds of said sales. Consolidated had moved from the premises of Miller in June, 1953, but continued to supervise the handling and the selling of the scrapers until the December, 1953, agreement. The sum of \$43,884.00 had been paid by Bank and by Consolidated to Miller on account of these forty-two scrapers prior to Miller's adjudication in bankruptcy.

Between July, 1952, and September, 1954, a representative of Bank made regular monthly inspections of the scrapers on the above-mentioned lot for the sole purpose of seeing that said scrapers corresponded in every way with those listed and described on the trust receipts (Tr. p. 179).

Upon a petition of the Bankruptcy Receiver filed with the Bankruptcy Referee, the Referee issued his order requiring Consolidated and Bank to establish the nature, amount and validity of any claim against the bankrupt and any lien, claim or security upon the bankrupt estate. The Trustee objected to the granting of any such claims or liens by the Referee on the grounds that (1) title asserted by Consolidated in said scrapers was void as against the creditors of Miller in that there had been no immediate and con-

tinued change of possession from Miller to Consolidated pursuant to California Civil Code Section 3440; and (2) since under Civil Code Section 3440 the title of Consolidated was void, Consolidated could not pass good title to Bank, thus invalidating the alleged security interest of Bank in the scrapers under the trust receipts. The Referee denied the claims of Consolidated and Bank (Tr. pp. 11-16) holding that neither Consolidated nor Bank had any right, title or interest in any of the scrapers. Consolidated and Bank filed petitions to review the order of the Referee. The District Court, in reversing as to Bank (Tr. pp. 32-38), held that Bank's title and interest in the scrapers was not derivative from Consolidated, but that Bank's security interest had been acquired directly from Miller; therefore, compliance with the provisions of Section 3440 was not necessary. The District Court affirmed as to Consolidated (Tr. pp. 32-38).

ARGUMENT.

I.

THE DEALINGS BETWEEN BANK, CONSOLIDATED AND MILLER WITH REFERENCE TO THESE SCRAPERS CREATED A VALID TRUST RECEIPT TRANSACTION.

California Civil Code Section 3014 defines a trust receipt transaction in part as follows:

“(1) A trust receipt transaction within the meaning of this chapter is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subdivision (3) of this section, whereby

“(a) The entruster or any third person delivers to the trustee goods . . . in which the entruster (i) prior to the transaction has, or for new value (ii) by the transaction acquires or (iii) as the result thereof is to acquire promptly, a security interest; * * * provided, that the delivery under paragraph (a) . . .

“(i) Be against the signing and delivery by the trustee of a writing designating the goods . . . concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or

“(ii) Be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing.

“The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

* * *

“(3) A transaction shall not be deemed a trust receipt transaction unless the possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

“(a) In the case of goods . . . for the purpose of selling or exchanging, or of procuring the sale or exchange; * * *.”

Clearly the arrangement which Bank had with Consolidated to finance the purchase of these scrapers from Miller fully conformed to the above definition of a trust receipt transaction. There is no question but that at the time Bank credited Miller's account with 90% of the listed value of the scrapers Bank

was giving new value, and that Consolidated signed and delivered to Bank shortly after the scrapers were delivered to Consolidated for the purpose of sale a written trust receipt describing the goods and reciting that a security interest therein was to remain in Bank.

There remains only the issue—did the delivery of the scrapers by Miller to Consolidated satisfy the requirement of delivery in Civil Code Section 3014 above? No decisions have been found under the Trust Receipts Act on this question, and it is believed the present case is one of first impression. However, whether there has been a delivery of goods is always a question of intent between the parties. See Civil Code Section 1738; *Peerless Motor Co. v. Sterling Finance Corp.*, 139 Cal.App. 621, 34 P. 2d 738 (1934). Nor, for that matter, is it essential that personal property be moved from one place to another in order to effect a delivery. A delivery is effected when the parties agree that control or dominion of the property is vested in the buyer and when the property is held at such a place as the buyer may designate. *Cownie v. Local Board of Review in and for City of Des Moines*, 235 Iowa 318, 16 N.W. 2d 592 (1944). *Van Drimmelen v. Converse*, 190 Iowa 1350, 181 N.W. 699 (1921). Certainly as far as Miller and Consolidated were concerned, there had been a full and complete delivery of these scrapers. The scrapers had been accepted by Consolidated and paid for by Bank; they had been turned over to the absolute control and discretion of Consolidated, subject only to Bank's security interest under the trust receipts. Nor is there

any question about the good faith of all the parties involved. Such a delivery is surely sufficient to satisfy this requirement of Civil Code Section 3014.

Furthermore, the record indicates that the question of delivery was never an issue before either the Referee or the District Court. The questions and the testimony of the various witnesses assume time and again that there had been a delivery of the scrapers to Consolidated:

“Q. What happened after the last process was done on a particular scraper?

A. It was delivered to our lot.

Q. What happened then and where on the lot were they delivered? Where was the lot?

A. Our lot could be described as the North-east portion of this piece of land that Miller set aside exclusively for the storing of Consolidated Distributors' equipment.”

(Tr. p. 85).

“Q. And if these [i.e., the scrapers, the workmanship, etc.] were all found to be in good order, what was done?

A. The machine was received.”

(Tr. p. 87).

“Q. And you did not accept delivery of the scrapers if they were in a defective condition?

A. We refused them.”

(Tr. p. 105).

“A. * * * If we discovered that some of the working parts on a scraper were unacceptable, we would ask them to replace these parts and

this was done immediately and then we would accept the scrapers. * * *"

(Tr. p. 105).

"Q. So, on some occasions repairs would be made several days after delivery?

A. Yes."

(Tr. p. 106).

"Q. And all of the articles with which we are concerned here were delivered before you left?

A. Yes."

(Tr. p. 109).

"Mr. Bechtel. * * * These are the dates, are they not, that the scrapers were delivered to Consolidated Distributors?

A. Yes. They were usually delivered the day the invoice was received.

Q. It would be true then that the scrapers described in these Trust Receipts were delivered to Consolidated Distributors subsequent to the last date appearing thereon on the 2nd of May 1953?

A. Right."

(Tr. pp. 109-110).

The effect of Civil Code Section 3440 on the transactions between Bank and Consolidated and Mille was the sole issue in the District Court. However the issue argued and decided there was not whether there had been a delivery to comply with Section 3440, but whether there had been an actual and continuous change of possession as required thereby. Section 3440 separates these two concepts as follows:

“Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an *immediate delivery followed by* an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor’s creditors while he remains in possession . . .” (Emphasis added).

The Referee neither found nor concluded that there had never been an immediate delivery of the scrapers under Section 3440 from Miller to Consolidated; rather he concluded only “that there was no immediate [sic] or continued change of possession of said scrapers from the above bankrupt to Consolidated Distributors, Inc., or any other person or a corporation, as required by Section 3440, Civil Code of the State of California . . .” (Tr. p. 16). Section 3440 says “actual”, not “immediate”, change of possession. The Referee’s failure to find that there was not an *actual* change of possession implies, at the very least, that he concluded there was an actual change of possession.

The only conclusion to be reached is that the question of a sufficient delivery was never an issue at all and that indeed there was a delivery sufficient to satisfy not only Civil Code Section 3014 (which Bank believes is the only pertinent section) but also Section 3440.

Once there was a delivery of the scrapers from Miller to Consolidated then Bank’s trust receipt ar-

rangement operated to give Bank a valid security interest in each scraper. A statement of trust receipt financing was on file with the Secretary of State (Tr p. 49).

Bank's position, sustained by the District Court was and is that its security interest in these scrapers was obtained directly from Miller, because the invoices were made out by Miller to Bank and Bank credited Miller's account with 90% of the listed value. It is submitted, however, that it does not matter whether Bank's security interest came directly from Miller or from Consolidated, so long as there had been a delivery of the scrapers to Consolidated. In either case, the Bank has a valid security interest in the goods. See Civil Code Section 3014, above, at pp. 6-7 *Universal Credit Co. v. Citizens State Bank of Petersburg*, 224 Ind. 1, 64 N.E. 2d 28 (1945); *Automobile Banking Corp. v. Weicht*, 160 Pa. Super. 422, 51 A 2d 409 (1947); *In re Chappell*, 77 F. Supp. 573 (D.C. Ore. 1948).

II.

BANK'S ACQUISITION OF A SECURITY INTEREST UNDER THE TRUST RECEIPTS ACT RENDERED CIVIL CODE SECTION 3440 IRRELEVANT.

In *Chichester v. Commercial Credit Co.*, 37 Cal App. 2d 439, 99 P. 2d 1083 (1940), the court held that where trust receipts are concerned, Civil Code Section 3440 is irrelevant. The court said, at page 448

"The further contention is made that the Uniform Trust Receipts Law repeals by implication

sections 3440, 2955, 2977 and 2920 of the Civil Code, dealing in general with chattel mortgages and bulk sales. There is no merit in this contention, *for trust receipts constitute the only type of security interest which is not governed by the same laws that existed prior to the enactment of the legislation in question.* Sections 3440, 2955, 2977 and 2920 of the Civil Code are still effective and permit the use of the types of security interests therein mentioned. It is true that the questioned legislation validates a type of trust receipt transaction resembling a chattel mortgage theretofore held invalid, but no change has been made in the law relating to chattel mortgages as such. The wisdom of this change is a matter for legislative, not judicial concern.

The act itself enjoins us to so interpret and construe the act 'as to effectuate its general purpose to make uniform the law of the states which enact it'. (Civ. Code, sec. 3016.14.) This rule of construction has for its purpose the object of unifying the laws of the several states on the same subject and is therefore not to be treated as a codification of local laws or commercial customs. The fundamental purpose of the act in question should be considered in the light of the general commercial law of the country as a whole. 'The principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it.' (*Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 528 [36 Sup. Ct. 194, 197, 60 L. Ed. 417].) The conclusions we have reached concerning the interpretation of the law are fully in accord with

these principles and are supported by the well reasoned opinions of the Federal District Court and Circuit Court in the case of *In re Boswell*, 20 Fed. Supp. 748 (affirmed, 96 Fed. (2d) 239) wherein the identical issues were presented by the attack upon the constitutionality of the act.' [Emphasis added.]

In the case of *In re Nickulas*, 117 F. Supp. 59 (D.C. Md. 1954), *aff'd per curiam sub nom. Tatelbaun v. Refrigeration Discount Corp.*, 212 F. 2d 877 (4th Cir. 1954), one of the issues was whether the claimant of merchandise, held by the bankrupt under trust receipts in full compliance with the Maryland Trust Receipts Act, was also obligated to see that the bankrupt had complied with Sections 18 and 20 of Article 2 of the Maryland Code. These sections provided that a person doing a mercantile business as an agent for another, or in a name other than his own must file in the clerk's office in the appropriate city or county a designation of the name and the address of the true owner of the business. If such agent failed to do this, any creditor could sue the debtor and subject any property on the premises to the satisfaction of his claim. The bankrupt, Nickulas, was doing business as "Manor Sales" or as "Manor Sales Furniture Store" and had not complied with the above sections. The court held that the security interest of the entruster was protected, saying, at p. 593:

"But more importantly I think it is to be noted that the Maryland Trust Receipts Act passed in 1941 is very much later in date than sections 1

and 20 of Art. 2 enacted in 1922, and long after the decisions by Judges Soper and Coleman. *The dominant point in this case is whether the claimant has substantially complied with the requirements of this later Act.* The last section provides that 'This article may be cited as the Uniform Trust Receipts Act.' This uniform Act has been passed in many other states, by at least 29 up to 1951. It seems to have been designed to enable small business dealers, without large capital, to procure merchandise for resale and at the same time protect prospective creditors of the dealer by giving recorded notice of the particular form of financing the business. Its wide adoption by a majority of the states indicates that it has found large favor as a new form of business financing. While I am not aware of any decision in the Maryland Court of Appeals, it seems a reasonable inference that in view of its wide adoption it should be liberally applied in business matters where there has been a reasonably full and substantial compliance with the requirements of the Act. The referee himself expressed this view in another connection.

Counsel for the trustee contends that there is an obligation on the claimant to comply not only with the Trust Receipts Act but also to see that the bankrupt had complied with sections 18 and 20 of Art. 2; but my view is that the Trust Receipts Act itself dispenses with that additional requirement because section 16 provides:

'16. (Election Among Filing Statutes.) As to any transaction falling within the provisions both of this Article and of any other act requiring filing or recording, the entruster shall not be re-

quired to comply with both, but by complying with the provisions of either at his election may have the protection given by the act complied with; except that buyers in the ordinary course of trade as described in subsection (2) of Section 9, and lienors as described in Section 11, shall be protected as therein provided, although the compliance of the entruster be with the filing or recording requirements of another act.'

The purpose of the Act is to protect the entruster where he complies with the Trust Receipts Act. That Act does not require him to do more. Section 16 is seemingly to the contrary. The Uniform Trust Receipts Act is a complete and independent Act of itself and when complied with protects the 'entruster' of the goods against attack by the trustee in bankruptcy. See Coin Machine Acceptance Corp. v. O'Donnell, 4 Cir., 192 F. 2d 773, upholding a claim of an 'entruster' who had complied with the Virginia Trust Receipts Act against the contentions of the trustee in bankruptcy based on recent amendments of the Bankruptcy Act. My conclusion is that Art. 2, §§ 1 and 20 of the Maryland Code do not apply to the instant case." [Emphasis added.]

III.

BANK IS NOT ESTOPPED TO ASSERT ITS VALID SECURITY INTEREST UNDER ITS TRUST RECEIPTS.

Appellant argues that Bank is estopped to assert its security interest in these scrapers, because the manager of Bank (or his agents) was aware that the scrapers were kept on the Miller premises. This

not a proper case for the application of the doctrine of equitable estoppel.

The court in the case of *Safway Steel Products, Inc. v. Lefever*, 117 Cal. App. 2d 489, 256 P. 2d 32 (1953), summarizes what factors are necessary to create an equitable estoppel, at p. 491:

“ ‘In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury.’ ”

Even if we assume that Bank was apprised of the location of the scrapers in this case, there is absolutely no testimony in the record that: (1) Bank intended that the creditors of Miller should be misled into believing the scrapers belonged to Miller; or (2) the creditors of Miller were ignorant of the true state of affairs and were in fact misled; or (3) any creditor of Miller did in fact rely upon the conduct of Bank to his injury. In view of this complete lack of testimony and proof, appellant's argument based on equitable estoppel is without foundation and is without merit. These scrapers belonged to Bank, and there is no reason either in law or in equity why Bank should be estopped from asserting its ownership when there is no proof that a single creditor was misled to his detriment. While the trustee does not have to prove actual

reliance and injury on the part of creditors to void a transfer under Civil Code Section 3440, he must so prove when he seeks to invoke the principle of equitable estoppel. The law as stated in the cases is set forth in 18 Cal. Jur. 2d, pp. 404-405, where the cases are collected:

“Restrictive Application. Estoppel is a harsh doctrine, and is never applied except where to allow the truth to be told would consummate a wrong to one party or enable the other to secure an unfair advantage. The defense of estoppel often means that the party against whom it is invoked is deprived of the right to prove the truth as to a matter involving a substantial right and may thereby be divested of a substantive right of property; and since, as a general proposition, the great end of judicial inquiry is to ascertain the truth, the law does not favor estoppel. *The doctrine is strictly applied, therefore, and will not be enforced unless substantiated in every particular.*” (Emphasis added.)

IV.

ASSUMING THAT CIVIL CODE SECTION 3440 IS APPLICABLE TO THESE TRANSACTIONS, THERE WAS A SUFFICIENT TRANSFER OF POSSESSION TO SATISFY THAT SECTION

Bank's position, as set forth above, is that Civil Code Section 3440 is irrelevant to this controversy. But if we assume Section 3440 is not irrelevant, then according to the cases decided thereunder, there was a sufficient "immediate [actual] and continued change of possession" to satisfy that section.

In the first place, the material facts in this case were never in dispute. Where the facts are undisputed, then this particular issue—was there an “immediate [actual] and continued change of possession” according to Section 3440—is a question of law and the upper court is not bound by the Referee’s findings below. *Southern California Collection Co. v. Napkie*, 106 Cal.App. 2d 565, 235 P. 2d 434 (1951); *Weil v. Paul*, 22 Cal. 492 (1863).

In *Porter v. Bucher*, 98 Cal. 454, 33 Pac. 335 (1893), appellant lived on a farm with her husband. Appellant owned cattle and horses as her separate property which she kept on the farm. She bought from her husband hay which had been stacked in corrals without moving it to another location. Afterwards the husband was adjudicated a bankrupt and his assignee in insolvency brought a replevin action and took the hay because of an alleged noncompliance with Section 3440. The wife in turn brought this action against the assignee for conversion of the hay. The trial court held the evidence was not sufficient for a jury to find there had been a delivery or change of possession and therefore held the sale void as a matter of law. The appellate court reversed and granted a new trial, saying at pp. 459, 460:

“Section 3440 of the Civil Code lays down no new rule as to what shall constitute a delivery. Any delivery that is sufficient to pass the title as between the parties is still sufficient, the statute only adding that it shall be ‘immediate.’ The expression, ‘an actual and continued change of possession,’ was construed in *Stevens v. Irwin*,

15 Cal. 503. It was there said: 'The word "actual" was designed to exclude the idea of a mere formal change of possession, and the word "continued" to exclude the idea of a mere temporary change but it never was the design of the statute to give such extension of meaning to this phrase, "continued change of possession," as to require, upon a penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results.'

"The supreme court of Pennsylvania said: 'In determining the kind of possession necessary to be given, regard must be had not only to the character of the property, but also to the nature of the transaction, the position of the parties and the intended use of the property.' (*Crawford v. Davis*, 99 Pa. St. 578).

"* * *

"* * * The code provides no different rule as to the formality of such transaction between husband and wife, from that required between strangers; yet the law, giving a reasonable construction to all such statutes, takes into consideration not only the character of the property, but the relations of the parties and the use of the property intended, and only requires that which would naturally be done in an honest and business-like transaction where there was no thought of fraud or concealment. * * *"

Shepherd v. Gamble, 95 Cal.App. 2d 893, 214 P. 2d 405 (1950), is another instance in which the court placed a reasonable construction on Section 344

here the two defendants and the respondent (third party claimant) were engaged in the same general type of work, i.e., landscape gardening. All three lived on the same premises. Defendants sold their equity in the used truck to respondent, who took the truck away for two months and then returned. For the next few months respondent was out of the state, but he left the truck at the above residence under an arrangement with the defendants to use it for a specified rental in order to help make the payments. Then the appellants (plaintiffs) attached the truck as that of the defendants. The trial court held that respondent was the owner of the truck. Appellants contended that the transfer was conclusively presumed to be fraudulent and void under Section 3440 because there had been no actual change of possession. The appellate court affirmed, saying at p. 895:

“To hold that such a transaction as that found by the court is conclusively presumed to be fraudulent would virtually prohibit valid sales or exchanges of movables between parties residing at and working out of the same premises. The Legislature could not reasonably have intended such iniquitous consequences.”

These cases demonstrate the practical and common sense approach taken by the courts in construing Section 3440 under circumstances similar to those present.

SUMMARY AND CONCLUSIONS.

The dealings between Bank, Consolidated and Miller with regard to these scrapers created a valid trust receipt transaction. Bank's acquisition of a security interest under the Trust Receipts Act rendered Civil Code Section 3440 irrelevant. Bank is not estopped to assert its valid security interest. Assuming, *arguendo*, that Civil Code Section 3440 is applicable to these transactions, there was a sufficient transfer of possession to satisfy that section. The applicable statutes, cases construing them, and particularly the liberal construction of the Uniform Trust Receipts Act by the courts, as well as principles of equity make clear and support the foregoing propositions:

Therefore, appellee Bank respectfully submits that the order of the District Court must be affirmed.

Dated, Oakland, California,
September 13, 1957.

Respectfully submitted,

HARVEY H. BECHTEL,

Attorney for Appellee

*Bank of America National Trust
and Savings Association.*

LEDGER D. FREE, JR.,
JAMES R. DRUMWRIGHT,
Of Counsel.

No. 15,456

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate of
Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLI-
DATED DISTRIBUTORS, INC., a corpora-
tion,

Appellees.

BRIEF OF APPELLEE
CONSOLIDATED DISTRIBUTORS, INC.

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Consolidated Distributors, Inc.

FILED

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DATED DISTRIBUTORS, INC., a corpora-
tion,

Appellees.

**BRIEF OF APPELLEE
CONSOLIDATED DISTRIBUTORS, INC.**

I.

STATEMENT OF JURISDICTION.

This is an appeal by the Trustee in Bankruptcy from an order of the District Judge reversing, in part, an order made by the Referee in Bankruptcy determining the nature, extent and validity of liens claimed by the Bank of America upon certain earth-moving machinery under statutory trust receipts. This

court has jurisdiction under the provisions of 11 U.S.C.A., Section 47, Subsection a., and General Orders in Bankruptcy 36 and 37, 11 U.S.C.A. following Section 53. The amount in controversy exceeds \$500.00.

II.

STATEMENT OF QUESTION PRESENTED.

The ultimate question presented by this appellate proceeding is solely whether the provisions of Section 3440 of the California Civil Code, requiring a sale of personalty to be accompanied by an actual and continued change of possession of the personal property sold, operates to invalidate trust receipt security transactions which are carried out in conformity with the Uniform Trust Receipts Law.

III.

SUMMARY STATEMENT OF FACTS.

The principal parties, business entities and personalities identified with these proceedings are as follows:

That Miller Scraper & Mfg. Co., Inc., a corporation, is successor to Kenneth L. Miller, an individual doing business as Miller Scraper Co. (both of said business entities being hereinafter sometimes referred to as "Miller"); that at all times Miller was engaged in the business of manufacturing and selling heavy-duty earth moving equipment, termed "scrapers", and cer-

tain farm equipment, having its factory and principal office located near Selma, in Fresno County (Tr., p. 78); that Consolidated Distributors, Inc., a corporation (hereinafter sometimes referred to as "Consolidated") is a California corporation organized for the specific purpose of acting as the dealer and market distributor of all scrapers manufactured by Miller; that Miller was adjudicated a bankrupt in August 1954; that Bank of America N. T. & S. A. is a national banking association in the position of lender (termed "entruster" under the Uniform Trust Receipts Act) of moneys to Consolidated Distributors, Inc., (termed "trustee" under the Uniform Trust Receipts Act) under statutory trust receipts method of inventory financing; and that Joseph L. Joy is trustee for Miller in bankruptcy.

The facts of this case are largely undisputed. Miller's manufacturing operations were carried on in a moderate-sized sheet metal building situated near the northwestern corner of a four-acre tract of land, which was on the southeast corner of the intersection of Manning Avenue and United States Highway 99 in Fresno County (Tr., pp. 78-85); that by a written agreement dated March 20, 1952 amended in writing on April 4, 1952, Miller and Consolidated agreed that Consolidated would purchase all of Miller's scraper production, agreeing "to accept all production upon completion at the yard of the manufacturing plant" (Tr., p. 194); that deliveries of scrapers by Miller to Consolidated began about April 1, 1952; that, as Miller employees pulled each scraper out of Miller's painting shed,

where it had been painted as the last step in its manufacture, it was unhooked-from upon Consolidated's storage lot of approximately one acre in size, which comprised the southeast corner of the four-acre tract of land owned by Miller (Tr., pp. 85-86); that, by the further terms of the written agreement of March 20, 1952, as amended, all scrapers so delivered by Miller, and accepted by Consolidated, were to be "stored and/or warehoused at the yard of the manufacturer at the direction of the distributor" (Tr., p. 207); that the written agreements set forth the full legal description of the Miller premises and were both immediately recorded in the public records of Fresno County; that the one-acre storage area was leveled and filled, and kept free of weed growth, providing a distinctive area for Consolidated's storage of scrapers (Tr., p. 181); that the various models of scrapers were extremely bulky, varying from two tons to nine and one-half tons in weight, from seven feet to eleven feet in width, and from five feet to eight feet in height (Tr., pp. 94-98); that Paragraph 3 of said written agreements, as amended, provided that Consolidated would cause Miller to be paid on the 1st and 15th of each month for all scrapers "appropriated" to this contract during the preceding bi-monthly period of time; that as each scraper was parked in the Consolidated storage area, each scraper was immediately inspected by Consolidated employees, who either accepted or rejected it, depending on whether any mechanical defects were discovered; that, if accepted, the Consolidated employee listed the scraper by model, serial

number, etc., on a statutory form of trust receipt (Tr., pp. 87-97); that invoices, in the nature of bills of sale, made out to Bank of America were received by Consolidated from Miller about the 1st and 15th of each month, upon which were listed and itemized the scrapers produced and delivered by Miller during the preceding 15-day period; that, as soon as the invoices were received, they were attached by Consolidated to the corresponding trust receipt documents and taken by Consolidated to the Selma Branch of the Bank of America; that immediately upon delivery of the trust receipts to the bank, Miller's account at that bank was credited with a sum equal to 90 per cent of the invoice price of each scraper listed upon the said trust receipts; that Consolidated thereafter sold the scrapers in regular course of business, upon notice to the bank, and accounted to the bank for the proceeds of any sale pursuant to the terms of the trust receipts (Tr., pp. 91-92); that the remaining 10 per cent of the invoice price was immediately paid by Consolidated to Miller, in cash; that the bank and Consolidated properly filed the required statutory notice of trust receipts financing; that every one of the forty-two scrapers involved in this proceeding, which remained unsold at the time Miller was adjudged a bankrupt in August 1954, had been so produced, accepted, and placed on trust receipt financing prior to March 31, 1953; that in 1953 Miller defaulted in the payment of certain moneys loaned by Consolidated to Miller, resulting in several actions at law by Consolidated against Miller for collection of accounts; that by writ-

ten agreement dated December 23, 1953, these accounts were settled, and Miller agreed to sell the remaining scrapers upon Consolidated's storage area at Miller's expense and to account for the proceeds of sale; that all of the said scrapers were at that time on the Consolidated storage lot, and remained there until moved therefrom slightly to the westward by Miller employees during July, 1954, approximately one month prior to Miller's adjudication in bankruptcy; *and that the sum of \$43,884.00 has been paid by the bank and by Consolidated to Miller on account of the forty-two scrapers with which these proceedings are concerned, prior to Miller's adjudication in bankruptcy*, being \$39,496.00 (90 per cent of the invoice prices) credited to Miller's account at the Selma Branch of the Bank of America from the said bank upon the statutory form of trust receipt, and \$4,388.00 (10 per cent of the invoice prices) paid directly in cash by Consolidated to Miller (Tr., p. 182).

IV.

THE DISTRICT COURT JUDGE PROPERLY RULED THE REFEREE TO BE IN ERROR IN DECREERING THAT THE TRUST RECEIPTS WERE INVALID, OR THAT THE ENTRUSTER BANK WAS ESTOPPED FROM ASSERTING THEIR VALIDITY.

This matter was first heard before the Referee in Bankruptcy upon orders to show cause directed at the Bank of America N. T. & S. A. and to Consolidated Distributors, Inc., directing those appellees to show cause respecting the nature, extent and validity of liens. The Referee's order decreeing that both the

bank and Consolidated had no interest in the scrapers (Tr., p. 11), was reversed in part by the District Judge upon review, who ruled that the bank's trust receipts constituted valid liens as a matter of law (Tr., p. 32), notwithstanding the Referee's finding that the sales transaction from the bankrupt (Miller Scraper & Mfg. Co., Inc.,) to Consolidated was not in compliance with Section 3440 of the California Civil Code.

This appeal involves a consideration of two unrelated statutory subjects: (a) Questions relating to a proper interpretation of Civil Code Section 3440 under the facts of this case, and (b) Questions relating to the trust receipts method of financing employed in this case.

- (a) **Section 3440 Should Be Construed by the Courts to Produce a Just and Fair Result, in Harmony With Established Commercial Practices and With Other Legislation, Including the Uniform Trust Receipts Law.**

The material portion of Section 3440, California Civil Code, reads as follows:

“Conclusive presumption of fraud. Every transfer of personal property and every lien on personal property made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is conclusively presumed fraudulent and void as against the transferor's creditors while he remains in possession and the successors in interest of those creditors, and as against any person on whom the transferor's estate devolves in trust for the

benefit of others than the transferor and as against purchasers or encumbrancers in good faith subsequent to the transfer.”

California Section 3440 was taken verbatim from Section 36 of the Personal Property Law of New York, and was in turn subsequently copied by the statute makers of Montana, Nevada, North Dakota, Oklahoma, and South Dakota. A noted authority who authored our Uniform Sales Act, *Williston on Sales*, (Second Edition, 1948), Chapter XV, Sections 349-404, pages 351-502, has collected the case law of every state in the union on this topic and his work contains a valuable discussion of the history of the section. According to Professor Williston, the doctrine of Section 3440 that a sale without delivery and an actual and continued change of possession is fraudulent has its historical origin in *Twyne's Case*, 3 Coke, 80 B, 76 Eng. Rep. 809 (Star Chamber, 1601) decided by the Court of the Star Chamber in 1601 at a time when the medieval lawyers were still concerned with *seisin* of chattels and did not recognize as valid any sale unaccompanied by both *delivery* (transfer of *seisin*) and *payment* of the price. *Slade's Case*, decided a year later in 1602, is the first case in which the validity of an “executory” sale was recognized and *assumpsit* was allowed for the price. The facts of *Twyne's Case* were that a seller of sheep was allowed by the buyer to remain in possession of the sheep, and he subsequently sold the sheep again to a second buyer, who obtained delivery. The court *held* the second buyer must prevail over the first, who had also paid for the

sheep. The court mentioned the statute of 13 Eliz., C. 5, 1570, sec. 2, enacted some 50 years earlier, which declared that transfers in *actual* fraud of creditors were void and which is the ancestor of our modern statutes on that topic. But the court in *Twyne's Case* obviously did not base its decision upon a finding of actual fraud, for the controversy was between an earlier and later buyer of the same goods rather than between seller and buyer, but instead was based upon the doctrines that there could be no sale (passage of title) without delivery. The subsequent rapid evolution of English law, permitting transfers of title unaccompanied by either delivery or payment of the price, led the English lawyers to explain *Twyne's Case* as a reflection of a policy of the Statute of 13 Elizabeth, and invited a misapplication of the rule of *Twyne's Case* from the two-purchasers situation to a seller-buyer situation, so that a sale without delivery was by false analogy to actual fraud declared to be *conclusively presumed* to be fraudulent as to the seller's creditors. The harshness of this rule led to its rapid evolution, so that it was soon declared to be only *prima facie* fraudulent, and by 1844 in England a sale without delivery gave rise to only an inference of fraud.

Only a handful of American states, of which California is one, have present-day statutes embodying the "conclusive presumption" of fraud language of the rule of *Twyne's Case*, and Professor Williston, and others, have suggested that such statutes can be made workable in practice only by construing them in

a reasonable way. Section 25 of the Uniform Sales Act, which is our Civil Code Section 1745, is our modern statutory statement of the problem of successive purchasers with the later purchaser getting possession in good faith. *In 1911, when the Uniform Sales Act was enacted in New York, the legislature at the same time repealed the law from which our Section 3440 was copied.* Of course, our legislature has not repealed our statute, but it seems to Appellee that the circumstance of its repeal by the great commercial state of New York, by virtue of its enactment of Section 25 of the Sales Act, is persuasive evidence of the fact that Section 25 of the Sales Act (California Civil Code, Section 1745) is perfectly adapted to perform the function that our Section 3440 is less perfectly designed to do, and that the harshness of this medieval statute should and must be applied with reason and caution, rather than narrowly and technically.

There can be no question upon the admitted facts of this case that there was an "immediate delivery" of the individual scrapers with which we are here concerned, for there can be no question that the scrapers were delivered by Miller to Consolidated as fully, completely and immediately as chattels of their size and bulk were capable. In *Shepherd v. Gamble*, 95 C.A. 2d 890 (1950), where "the question for decision is whether the transfer of a huge tractor was void under Section 3440 of the Civil Code by reason of the circumstances proved with respect to its delivery," the court held that "where a moveable is bulky and not readily transferable by manual delivery the rule of

that section is relaxed by reason of the impracticability of actual delivery by ordinary means and methods (citing cases).” This is equivalent to saying that the “delivery” required by statute is that kind of physical handing over which is reasonably possible under the circumstances.

The facts found by the Referee with respect to the issue of delivery and change of possession in this case, which were adopted by the District Judge as the findings of that court upon review, do not contain any finding that there was no delivery of the scrapers in question. The Referee’s stated conclusions of law are “that there was no immediate or continued change of possession of said scrapers . . . as required by Section 3440 . . .” (Tr., p. 16). Nor does the Referee state any conclusion that delivery was not accompanied by an actual change of possession. The sole conclusion of law which the Referee made as the basis for his order was that delivery was not followed by a “continued” change of possession.

The standard of reasonableness of interpretation required in connection with the facts of particular cases is demonstrated in *Porter v. Bucher*, 98 Cal. 454 (1893), where the question involved the construction of the statutory requirement of continued change of possession. In the *Porter* case a man and his wife carried on cattle feeding operations on their farm, and the husband sold 120 tons of hay stacked thereon to his wife. The hay remained in its original location beside the corrals. Then, the husband having filed a petition in insolvency, his trustee sought to replevy

the hay from the wife because of alleged non-compliance with Section 3440. The court instructed the jury that as a matter of law the sale was void. In reversing the judgment for this error in instruction, the California Supreme Court said:

“The expression, ‘an actual and continued change of possession,’ was construed in *Stevens v. Irwin*, 15 Cal. 503. It was there said: ‘The word “actual” was designed to exclude the idea of a mere formal change of possession, and the word “continued” to exclude the idea of a mere temporary change; *but it never was the design of the statute to give such extension of meaning to this phrase, “continued change of possession,” as to require, upon a penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results.*’ ” (Page 459) (Emphasis added.)

The court in the *Porter* case, noting that the parties (husband and wife) had been in the hay and cattle business for some years, buying and selling hay and feeding it at the stacks, considered the good faith commercial relationship evidenced by the facts of the case as being of extreme importance with respect to the construction to be given to Section 3440, stating that,

“The Code provides no different rule as to the formality of such transaction between husband and wife, from that required between strangers; yet the law, *giving a reasonable construction to all such statutes*, takes into consideration not only

the character of the property, but the relations of the parties and the use of the property intended, and *only requires that which would naturally be done in an honest and business-like transaction where there was no thought of fraud or concealment.*" (Page 460) (Emphasis added.)

And in the recent case of *Shepherd v. Gamble*, reported at 95 C.A. 2d 893 (1950), (being a second case of the same name, in addition to the case hereinabove cited and discussed), both the seller and the buyer of a truck were landscape gardeners, with the seller living in the main house while the buyer lived in a small house in the rear on the same parcel of residential property. Both conducted their businesses out of their respective homes. There were no signs on the truck to indicate a change of ownership, and after an absence of only two months the buyer brought the truck back to the seller's premises, where the buyer also resumed his residence, and the truck was used by buyer and parked on the premises for the next seven months. Then, before departing from the state for a five months' absence, *the buyer turned possession of the truck back to the seller under an arrangement whereby the former owner would use it in his business* in return for keeping up the buyer's payments to the finance company. During the new owner's absence the truck was levied upon by a creditor of the former owner. The decision applauds the trial court's determination that there was a sufficient 'actual and continued change of possession' to satisfy the statute, with these words:

“To hold that such a transaction as that found by the court is conclusively presumed to be fraudulent *would virtually prohibit valid sales or exchanges of moveables between parties residing at and working out of the same premises.* The Legislature could not reasonably have intended such iniquitous consequences.” (Page 895) (Emphasis added).

The above cases, and many others which could be cited, illustrate the common sense approach which our courts have taken in constructing Section 3440 in commercial transactions. It is unthinkable that a statute of such importance to modern commercial relationships should be applied either narrowly or technically. It has been held in *Weil v. Paul*, 22 Cal. 492 (1863), and in *Southern California Collection Co. v. Napkie*, 106 C.A. 2d 565 (1951), that where there are no disputed material facts the question of compliance or non-compliance with Section 3440 is a question of law to be determined by the court. General Order in Bankruptcy No. 47 states that the Judge, upon review, shall accept the Referee's finding of fact unless clearly erroneous but pointedly omits any requirement that the Referee's conclusions of law must be accepted by the court. The Referee's order which decreed a forfeiture of the purchase price paid for these scrapers and received by the bankrupt prior to bankruptcy, and which also struck down the bank's lien for payment of its loan upon the scrapers was, in these circumstances, a grossly inequitable and absurd result which the District Court Judge properly

corrected in his order appealed from in these proceedings.

b) The Bank's Security Interest Under Its Trust Receipts Was Valid, for Section 3440 Has No Relevancy to Trust Receipts Transactions.

Consolidated and the bank have a community of interest on this appeal in the question of the validity of the trust receipts in that the scrapers have so declined in value because of their long exposure to wind, rain and sun in their place of storage that the 10 per cent (\$4,388.00) equity that Consolidated formerly had in the scrapers as new machines has been wiped out. For this reason Consolidated did not appeal from that portion of the Judge's order appealed from in these proceedings which adopted the Referee's findings of fact upon the issue of compliance or non-compliance with Section 3440 as far as a sales transaction between a seller (Miller) and a buyer (Consolidated) is concerned, for Consolidated is of the opinion that the Judge's decision that Section 3440 has no relevancy to the trust receipts with which we are concerned in this case was entirely correct and should be sustained as being decisive of all questions presented on this appeal.

The Uniform Trust Receipts Law was enacted in California in 1935 as Sections 3012 to 3016.16 of the Civil Code. *The stated purpose of the new legislation was to bring our California law into uniformity with the laws of other states which enact it.* Through the present time twenty-nine of our states and territories have enacted this uniform act.

The appellant contends in his opening brief that the District Judge erred in reversing that portion of the Referee's order relating to estoppel. The Referee's conclusions of law on this point state only: "... that since the Bank of America N. T. & S. A. was aware at all times of the facts concerning said lack of change of possession, said Bank of America N. T. & S. A. is estopped from claiming any better title than was obtained by Consolidated Distributors, Inc.; and that by reason of said lack of change of possession, said purported sale from the above bankrupt to Consolidated Distributors, Inc., was and is, void." (Tr., p. 16).

It is difficult to analyze precisely what this ambiguous statement means, but among its possible implications are (1) that the trust receipts were invalid because of an alleged lack of delivery followed by an actual and continued change of possession of the scrapers within the purview of Section 3440, and/or (2) that granting that the trust receipts were valid, the Bank of America was by some act of commission or omission estopped from asserting the validity of its lien acquired thereby.

Turning now to a consideration of the first stated proposition, that the trust receipts were invalid because of alleged non-compliance with Section 3440, the question is emphatically answered in the negative in the *Chichester* case (*Chichester v. Commercial Credit Co.*, 37 C.A. 2d 439 (1940)), which is a leading case in this state construing the Uniform Trust Receipts Law.

In the *Chichester* case a certain Reagan, doing business both individually and as a corporation as a Los Angeles Chrysler and Plymouth auto dealer, obtained financing from the defendant Commercial Credit Co. and purchased new cars for resale from the Chrysler Corporation factory. On pages 441 and 442 of the report we read that—

“Under the procedure adopted in the purchase of the automobiles in question whenever Reagan wished to obtain Plymouth automobiles, he went to the office of the defendant and signed trust receipts for the cars which he desired to purchase, together with promissory notes in the same amounts as the trust receipts. Thereafter, defendant called the Los Angeles office of the Chrysler Corporation and ordered the automobiles delivered to Reagan’s place of business. In the case of the purchase of Chrysler automobiles, Reagan placed the order with the Chrysler Corporation in Detroit, Michigan, and after payment of the purchase price by defendant, the automobiles were shipped to Reagan but the bills of lading were made out to, and sent directly to defendant. After Reagan had signed trust receipts for the automobiles, together with promissory notes in the same amounts as the trust receipts, defendant delivered the bills of lading to Reagan and the latter took delivery of the automobiles.”

The automobiles in question in the *Chichester* case were in Reagan’s showrooms at the time he and his corporation filed in bankruptcy. When the defendant credit company took possession of the cars under the

terms of the trust receipt Reagan's trustee in bankruptcy brought an action for conversion. A proper statement of trust receipts financing had been filed with the Secretary of State in accordance with the provisions of Section 3016.9 of the Civil Code. The complaint alleged three causes of action, the third alleging that the transfer of the cars from the Chrysler Corporation to Reagan was void because of failure to comply with the provisions of Section 3440 of the Civil Code. Judgment was for defendant, and an appeal was taken.

The court noted that the very first requirement of Section 3440 is *delivery*, and that there was no delivery of any of the cars until after the trust receipts were signed. Moreover, unlike the case at bar, no documents of title were delivered to the bank until *after* the trust receipts were executed and delivered.

“The bills of lading were not delivered to Reagan until after the trust receipts had been signed. Concerning the Plymouth automobiles which were delivered from the Los Angeles office of the Chrysler Corporation, defendant after securing trust receipts from Reagan, ordered the cars to be delivered to Reagan's place of business and paid the purchase price directly to the corporation. *There is no evidence whatever tending to prove that Reagan at any time prior to signing the trust receipts, had either title to or possession of any of the automobiles in question.*” (Page 444) (Emphasis added).

But the court *held* that the trust receipts were valid, notwithstanding there was neither a sale nor delivery

prior to their execution. To the argument that this construction of the Uniform Trust Receipts Law had the practical effect of repealing Section 3440, the court stated it was not impressed with the argument for the reason that "... trust receipts constitute the only type of security interest which is not governed by the same laws that existed prior to the enactment of the legislation in question" (Trust Receipts Act), and further—

"The act itself enjoins us to so interpret and construe the act 'as to effectuate its general purpose to make uniform the law of the states which enact it'. (Civil Code Section 3016.14.) This rule of construction has for its purpose the object of unifying the laws of the several states on the same subject and is therefore not to be treated as a codification of local laws or commercial customs. *The fundamental purpose of the act in question should be considered in the light of the general commercial law of the country as a whole. 'The principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it.'* (Commercial Nat. Bank v. Canal-Louisiana Bank & Trust Co., 239 U.S. 520, 528 (36 Sup. Ct. 194, 197, 60 L. Ed. 417).)" (Page 448) (Emphasis added).

The same argument that Section 3440 is applicable to a trust receipts situation had been previously rejected by our Federal Courts in California in *In re Boswell*, 20 F. Supp. 748 (1937). In that case the Referee had ruled that the new law was violative of our state constitution. District Judge McCormick, in

his opinion, noted that the counsel for the trustee in bankruptcy dwelt at length in briefs and in oral argument upon the complexities of the new law and upon the "grave changes" that it introduced into the statutory commercial credit methods of this state. And the counsel must have argued that the newly-enacted Uniform Trust Receipts Act validated security transactions unaccompanied by delivery or change of possession, thereby limiting the operation and scope of Section 3440, for the court's opinion adverts to the statutory language of Section 3440 in the following statement:

"Trust receipts have long been independent security devices employed in commercial credit transactions. (*In re Cattus* (C.C.A. 2, 1910) 183 F. 733.

Their use has become greatly extended in the United States since the automobile has assumed its nationwide and popular proportions in financing and credit requirements for this major industry. *In re Bell Motor Co.* (C.C.A. 8) 45 F. (2d) 19. So that today these mercantile mediums, because of their beneficial features in quick credit transactions and their frequent judicial concern, have become thoroughly established and identified in business and law. When the term 'Trust Receipt' is used in commerce, the credit and financial agencies of present-day activities associate it with a security instrumentality that resembles a pledge, a chattel mortgage, or a conditional sale contract, but which is exactly none of these mediums of trade and credit. It is a transaction germane to these instrumentalities because it is like them, closely allied and related to them. Some

chief differences that readily enter the mind when the term is used *include the absence of actual or immediate delivery or change of possession*, the removal of notice, recordation or verification requirements, and the *retention of title in the vendor*.

The respondent trustee in bankruptcy eloquently animadverts that nowhere in the title to the questioned 'Trust Receipts Law' is there any intimation that the Legislature intended to 'tinker with the salutary provisions regarding chattel mortgages, their recordation, *or sales*, or assignment of merchandise in bulk * * * or conferring on merchants the right to mortgage their entire stock in trade secretly and without notice whatsoever, unless wholesalers maintain a Bureau at Sacramento to keep a daily check on the office of the Secretary of State.'

But we think that mentioning the general and commercially understood subject of 'Trust Receipts' in the title connotes and suggests fields of state legislation concerning the requirements of valid chattel mortgages as against third parties and creditors, *delivery and possession necessities under laws relating to personal property*, and the title expressly states that the statute is aimed at 'Trust Receipts and pledges of personal property unaccompanied by possession in the pledgee.' This terminology, in the light of historical efforts of financial and mercantile agencies in different states to remove conflicts and complications in the commercial law of the country, is a reasonably intelligent reference to *changes* that are found in the text of the 'Uniform Trust Receipts Law.''' (Pages 751-752) (Emphasis added.)

Appellee believes that Judge McCormick clearly indicates, in the above-quoted portion of his opinion that the new act effected a marked change in the previously existing law, insofar as it concerned the effect of the language of Section 3440 respecting delivery or change of possession of the chattels covered by a trust receipt transaction.

The Law itself, in Section 3016.13, clearly implies that the provisions of the Uniform Trusts Receipts Law embody a change in the ancient rules relating to delivery of possession in situations to which the Law applies. Section 3016.13 reads as follows:

“Section 3016.13. *Cases not provided for.* In any case not provided for in this chapter the rules of law and equity, including the law merchant shall continue to apply to trust receipt transactions and purported pledge transactions *not accompanied by delivery of possession.* (Addecd Stats. 1935, c. 716, p. 1939, Sec. 1.)” (Emphasis added.)

The foregoing case of *In re Boswell* (affirmed 90 Fed. 2d 239) is a leading case, frequently cited as definitive. Volume 89 of *Corpus Juris Secundum*, published in 1955, carries Judge McCormick's language into the body of the text of the article on *Trust Receipts* citing the *Boswell* case as footnote authority as follows:

“As used in commerce by credit and financial agencies it is regarded as a security instrumentality which resembles a pledge, a chattel mortgage or a conditional sales contract, but is exactly none

of these mediums of trade and credit. Some of the chief differences are the absence of actual or immediate delivery, or change of possession, the removal of notice, recordation or verification requirements, and the retention of title in the vendor." (89 C.J.S. 697.)

It need hardly be noted that the Trustee in Bankruptcy does not claim that the trust receipts in the present case are invalid because of any failure to follow the statutory method of trust receipts financing. The trust receipts in this case were executed in a proper and usual manner by a dealer (Consolidated), named a "trustee" under the Act, to secure repayment by the trustee of money loaned to the trustee by the lending institution (Bank of America), as "entruster," which money enabled the trustee to pay for the scrapers purchased from the manufacturer (Miller). Compare *Commercial Discount Co. v. Los Angeles*, 16 Cal. 2d 158 (1940). The entruster has a "mercantile" title, something more than the commonly understood concept of security title, since the entruster can repossess the goods at will under a trust receipt whether the trustee is in default or not.

A frequent source of confusion concerning the source and nature of the entruster's title arises from the unfortunate currency of the word "trustee" as used in trust receipts financing. By well-known and understood principles of equity law a "trustee" is a holder of legal title for the benefit of another, but Section 3014 of the Civil Code specifically states among other things, in defining the word "trustee" as

used in the Uniform Act, that the use of that word in the Act "shall not be interpreted or construed to imply the existence of a trust or any right or duty of trustee in the sense of equity jurisprudence . . ."

It is apparent that the keystone of appellant's argument on this appeal on the trust receipts question is that the security interest of the entruster Bank of America is a "derivative title" from the trustee (Consolidated). On page 10 of appellant's opening brief, counsel for appellant states his prime argument that "Since a trust receipt is similar to a chattel mortgage in that a security interest is transferred for the purpose of securing an obligation to repay money, the general rule relating to the requirement that the validity of a mortgage must depend on the validity of the title of the mortgagor also applies with respect to the necessity of the valid title being vested in the owner of property upon which it executes a trust receipt . . .", and appellant goes on to state his reliance upon the general rule that a mortgagee gets no better title than his mortgagor had. Based upon this false premise of the nature of the security interest of the entruster in this case, the argument of the appellant Trustee in Bankruptcy then proceeds that a failure to comply with Section 3440 voids the trustee's (Consolidated's) title to the goods sold and that the entruster's (bank's) title is thus also voided because dependent upon Consolidated's title.

Prior to the adoption of the Uniform Trust Receipts Law in California, it was held in *Arena v. Bank of Italy*, 194 Cal. 195 (1924), that if the entruster's

security interest is derived from the trustee the transaction was a chattel mortgage and not a true trust receipt transaction, and was void as to the creditors of the "mortgagor" in the absence of recordation of the instrument. But the changes effected by the trust receipts law upon this stated doctrine of the *Arena* case were stated thusly by the court in the *Chichester* case, cited above, as follows:

"Plaintiff places great reliance upon the case of *Arena v. Bank of Italy*, supra, in support of his contention that a trust receipt which does not comply with the provisions of section 3440 of the Civil Code is void as against creditors of the trustee. That decision, however, is clearly distinguishable upon its facts from the instant case. *It must be borne in mind that the Arena case was decided long prior to the enactment of the Uniform Trust Receipts Law.* In the *Arena* case, one Dellaira having both the title and possession of certain goods, assigned and delivered possession of such goods to the Bank of Italy as security for an indebtedness; thereafter the bank restored the possession of such goods to Dellaira and, at the same time took the trust receipts in question from Dellaira. Obviously, whatever title or interest the bank acquired could only have been derived from Dellaira, the trustee under the trust receipts. The court properly held that *under the law which existed at that time, i.e., prior to the enactment of the Uniform Trust Receipts Law*, the transaction was to be treated as being in the nature of a chattel mortgage and consequently void as against the trustee's (debtor's) creditors unless properly recorded.

From the foregoing discussion it appears that under the former law the source of the entruster's title was the controlling factor in determining whether or not a given trust receipt transaction was valid. However, under the existing law, by which the instant case is to be governed, the entruster's security interest will be protected whether his title is derived from the trustee or from a third party. From an examination of section 3014 of the Civil Code, which defines trust receipt transactions, it is apparent that the legislature intended to include within the general provisions of the law all trust receipt transactions without regard to the source of the entruster's title. That section provides, among other things: "The security interest of the entruster may be derived from the trustee or from any other person and by pledge or by transfer of title or otherwise." (Pages 444-445.) (Emphasis added.)

"... Such was the holding in the case of *In re Boswell*, supra, wherein a type of security instrument, identical with that of the *Arena* case, was held to be valid under the Uniform Trust Receipts Law." (Page 447.)

Counsel for appellant Trustee in Bankruptcy, on pages 16 through 25, has attempted to distinguish the *Chichester* case from the case at bar primarily on the ground it is the seller (Miller) who is bankrupt here rather than the buyer (Reagan) who was adjudicated bankrupt in the *Chichester* case. On page 19 of appellant's opening brief counsel objects to applying the rule of the *Chichester* case "as an abstract rule of law", and on page 20 of his brief counsel for ap

ellant makes the flat statement that Civil Code Section 3014 (which provides that the security interest of the entruster may be derived from the trustee or from any other person) applies only in a "normal" trust receipt transaction where Section 3440 has been complied with. Counsel has cited no cases from California or from any other jurisdiction which has enacted the Uniform Trust Receipts Law, or otherwise, to illustrate or to support this asserted rule of law. The court found in the *Chichester* case that Reagan had neither title nor possession of the cars before delivery of any of the warehouse receipts, and still the court held the trust receipts were valid. The prime purpose of the Uniform Trust Receipts Act is to validate trust receipts and to thus foster the commercial usages of the country by protecting the lender's (entruster's) security interests. And it makes no difference in the fulfillment of this objective whether it is the buyer (trustee) or the seller of the goods who becomes bankrupt. The *Chichester* case, then, cannot be thus distinguished from the present case. In addition to the fact that the law (Civil Code Section 3014) now expressly states the source of the entruster's title to be immaterial, and therefore not subject to attack because of any weakness or infirmity in a claimed gain of title, is the plain fact that in the present case the entruster's title comes directly from the seller (Miller) by virtue of delivery to it of the bills of sale attached to the trust receipts wherein the bank, and not Consolidated, is named as transferee. Thus, in both law and fact, the entruster's title is here not derivative.

As the court in the *Chichester* case said, in commenting upon the security interest of the entruster in a trust receipt transaction—

“... The security interest of the defendant (entruster) was paramount to the claims *of all other persons, including the trustee in bankruptcy.* (Page 449) (Emphasis added.)

And Section 3016.3 of the Code specifically states that if the entruster properly files a statement of trust receipts financing, as provided in the Law, his security interest in the goods “shall be effective *against all persons,*” except as specifically otherwise provided in the Uniform Trust Receipts Law. The provision of Section 3016.3 encompass *all persons*, as distinguished from only the creditors of the trustee mentioned in Section 3016.4 of the Law.

The cases cited by the Trustee in Bankruptcy on pages 18, 19 and 20 of the Reply Brief, relating to transfer of a voidable title to a bona fide purchase for value, have no relevancy here, because of the fact that the entruster’s (Bank of America’s) security interest under the trust receipts is not a derivative title in any sense of the word, either in law or in fact in this case, and as previously noted the Act expressly states that it does not deal in classical equity concepts of title.

(c) No Estoppel Exists Against the Bank Asserting the Validity of Its Trust Receipts.

The last point remaining for discussion is the claimed estoppel against the bank to assert the validity

its lien rights under the trust receipts. The Referee's conclusions of law contained the statement that the bank is estopped because it "was aware at all times of the facts concerning said lack of change of possession." This is apparently based solely upon the finding that Jess Forrest, the bank manager, allegedly saw on his visits to the premises "that said scrapers were intermingled with other equipment of the above bankrupt." This is a reference to the proximity of junked scrapers and junked orchard heaters and farm wagons belonging to Miller at the time of bankruptcy. The case of *Ballou v. Andrews Banking Co.*, 128 Cal. 22 (1900), cited and discussed on page 11 of Appellant's Opening Brief, and the excerpt from *Brown v. Bank of Napa*, 77 Cal. 544 (1888) appearing on pages 11 and 13, involved the question of whether the lending agency was a bona fide purchaser for value or had knowledge of the infirmity of title. These cases, and the others cited by the Trustee in Bankruptcy in his Brief, all relate to the equitable doctrine concerning the transfer of a voidable title to a bona fide purchaser for value. It seems rather obvious that these are not estoppel cases, and ought not to be confused with the doctrine of estoppel. The argument proceeds by false analogies, and is not relevant to the issue of this case involving questions of construction of statute law. The arguments of counsel for appellant Trustee in Bankruptcy concerning the claimed estoppel are all deeply involved with his arguments concerning the alleged derivative title. Appellee believes that any claim of promissory or equitable estoppel against the

bank is fanciful. The duties of the entruster bank are prescribed by the Uniform Trust Receipts Law. The law provides for a reasonable period of validity of the entruster's security interest without filing (30 days) and affords a convenient manner and place for thereafter filing a notice of trust receipts financing. The inspections made by Mr. Forrest, the bank manager, were solely for the purpose of identifying the merchandise with that listed on the trust receipt and to see that no machine had been disposed of without discharging the lien (Tr., p. 121). *Mr. Forrest, on his visits of inspection, observed apparent, normal relationships between Miller and Consolidated in which everyone was respecting the bank's lien rights under the trust receipts* (Tr., pp. 178-180). There is no evidence or argument here presented that the bank made any representations, or misrepresentations, or that any person was misled thereby. Under these circumstances the claimed estoppel does not exist, and certainly the appellant Trustee in Bankruptcy has demonstrated neither law nor fact to support his argument that the bank is estopped to assert the validity of the lien of its trust receipts.

V.

CONCLUSION.

That portion of the referee's order decreeing that the bank's trust receipts were invalid, or that the bank was estopped from asserting their validity, was contrary to law, upon the authorities hereinabove cited, and Judge Jertberg properly and lawfully exercised his authority under General Order in Bankruptcy No. 47 to correct that portion of the Referee's order which was "clearly erroneous." The appellant's attack upon the Judge's order appealed from is based squarely upon the demonstrably false premise that the trust receipts are "void" because allegedly dependent upon the title of Consolidated in the scrapers here in question. The provisions of the Uniform Trust Receipts Law, and the decisions of the State and Federal Courts construing that law, cited and discussed in this brief, demonstrate the error of that basic premise. In appellee's view of the case the Referee misconstrued and misapplied Section 3440 of the California Civil Code to reach an "unjust and absurd result," in which the scrapers in question were declared forfeited to the Trustee in Bankruptcy, and forfeiture was also decreed of the sum of \$39,46.00, in cash, paid by the bank to Miller and the further sum of \$4,387.00 in cash paid by Consolidated to Miller. It is submitted that the provisions of Section 3440 of the California Civil Code do not affect the provisions of the Uniform Trust Receipts Law upon which appellee relies in these proceedings, and that the question of the validity of the entruster's

security interest in the scrapers here in question must be determined by reference to the law of trust receipts. It is further submitted that the trust receipts introduced into evidence in this proceeding are valid under the Uniform Trust Receipts Law, in the circumstances of this case, and that no estoppel exists against the Bank of America to assert the validity. The order of the Honorable Gilbert H. Jerberg, District Judge, appealed from in these proceedings, should be affirmed.

Dated, Fresno, California,
September 19, 1957.

Respectfully submitted,

CHARLES RAY BARRETT,

*Attorney for Appellee
Consolidated Distributors, Inc.*

No. 15,456

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate of
Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

VS.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLIDATED
DISTRIBUTORS, INC., a corporation,

Appellees.

CLOSING BRIEF IN ANSWER TO
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**CLOSING BRIEF IN ANSWER TO
BRIEF OF BANK OF AMERICA.**

SUPPLEMENTAL STATEMENT OF FACTS.

Before proceeding to answer the Reply Brief of Bank of America, National Trust and Savings Association, Appellant desires to comment upon the sign with letters three inches high mentioned on page 5 of the Statement of Facts of Appellee indicating the office of Consolidated Distributors, Inc. While there was such a sign on the front of the building for a period of time, this sign was removed about June 1,

1953, and for a period of about 14 months thereafter to August 2, 1954 (Tr. p. 5, line 18) when the bankrupt corporation filed its Bankruptcy Petition, there was no sign of any type indicating Consolidated had an office on the four-acre tract or any interest in the premises. The absence of any sign *after June 1, 1953* is proved by the testimony (Tr. p. 101, lines 12-32) of W. A. Reynolds, President of Consolidated. With further reference to the absence of signs bearing the name "Consolidated Distributors, Inc." *at all times* on the scrapers in question, Appellant desires to supplement his Statement of Facts by the testimony found in (Tr. p. 54, lines 7-9, Tr. p. 60, lines 17-18, Tr. p. 68, lines 29-31 and Tr. p. 134, line 31 to p. 136, line 22).

ARGUMENT.

I.

DEALINGS BETWEEN CONSOLIDATED AND BANK CREATED AN INVALID TRUST RECEIPT TRANSACTION.

Appellant, prior to answering Part I of the Reply Brief, respectfully directs the attention of the Honorable Court to the meager, if any, comment upon or discussion of Part I of Appellant's Opening Brief (pages 5-7) relating to the error of the District Court in failing to affirm the Fourth and Seventh Findings of Fact of the Bankruptcy Referee. Both Findings of Fact are supported by evidence to be found in the Transcript proving an invalid sale of the scrapers by the bankrupt corporation to Consolidated prior to its

execution of the Trust Receipts with the Bank, and the knowledge by Bank of the lack of open, notorious and continued change of possession by Consolidated. As to the absence of any right, title and interest in any scrapers by Consolidated, the Findings of Fact and Conclusions of Law of the Bankruptcy Referee were affirmed by the District Court in the portion of its Opinion set forth in (Tr. p. 35, lines 8-32 and p. 36, lines 1-11) as follows:

“As a conclusion of law from the findings of fact, the Referee found:

‘That there was no immediate or continued change of possession of said scrapers from the above bankrupt to Consolidated Distributors, Inc., or any other person, firm or corporation, as required by Section 3440 of the Civil Code of the State of California, and that since the Bank of America NTSA was aware at all times of the facts concerning said lack of change of possession, said Bank of America NTSA is estopped from claiming any better title than was (61) obtained by Consolidated Distributors, Inc., and that by reason of said lack of change of possession, said purported sale from the above bankrupt to Consolidated Distributors, Inc., was and is, void.’

Two questions are presented by this review. The first question relates to the extent and validity of any interest or title of Consolidated in the scrapers. *The Referee concluded that Consolidated had no right, title or interest because there had been no immediate or continued change of possession of the scrapers as required by Section 3440 of the Civil Code of the State of California.* The Court

has reviewed the findings made by the Referee and the transcripts of the testimony taken by the Referee. The Court is in no position to state that the findings of fact and the conclusions of law of the Referee in this respect are erroneous. Reasonable minds might reasonably disagree on the conclusions to be drawn from all of the evidence before the Referee. *This Court will therefore not disturb the findings of fact or the conclusions of the Referee insofar as they relate to any interest, right or title of Consolidated in and to the scrapers, and his findings and conclusions in that respect are affirmed.*” (Emphasis added.)

Appellant concedes that Consolidated and Bank complied with the provisions of the Uniform Trust Receipts Act. Such compliance, however, did not make the Trust Receipts in question valid as against the Trustee and creditors of Miller because of the *defective security interest* acquired by Bank from Consolidated. The Conclusion of Law (Tr. p. 16, lines 1-14) of the Bankruptcy Referee and affirmed by the District Court (Tr. p. 36, lines 7-11) that the purported sale of the scrapers by the bankrupt to Consolidated was void as to the bankrupt’s creditors conclusively proves that the *derivative security interest* asserted by the Bank under its Trust Receipts is also void as to the same creditors. Merely because the Bank conformed to a Trust Receipt transaction under Civil Code Section 3014 does not validate its Trust Receipts if the alleged security interest asserted by it is void.

Pages 8 to 10 of the Reply Brief discusses the question of delivery of the scrapers and testimony and several cases are set forth. Delivery was never an issue before the Referee or the District Court. The matter litigated before the Referee was whether or not there

had been compliance with Civil Code Section 3440 by an immediate and continued change of possession by Consolidated of the scrapers purchased from Miller pursuant to the Agreement dated March 20, 1952 (Tr. pp. 191-204) and the Amendatory and Supplemental Agreement dated April 4, 1952 (Tr. pp. 204-213).

Mention is made on page 8 of the Brief of the absolute control of the scrapers by 'Consolidated purchased from Miller. Testimony on pages 149 and 169 of the Transcript clearly refutes this statement since employees of the bankrupt had access to the unfenced area *at any time* to move the scrapers to level and scrape the storage area. The following testimony is to be found on page 149 of the Transcript lines 4-23:

“Q. Was there in the area, the storage area, any so-called ‘levelling off’ or ‘scraping off’ operations carried on during the period that this contract was in effect?

A. You say was there levelling operations carried on?

Q. Yes.

A. Yes, due to erosion and where the scraper was pushed on the ground it would get rough, and so *they would clean up periodically and replace them* back on the location to make a better appearance.

Q. How much time would be involved because of the moving for that purpose?

A. Sometimes there would be two, three, or four weeks, because it would be done by Miller Scraper and Manufacturing Company to keep his premises in shape and *he would just do that (37) when he had men he wasn't using for productive purposes in the factory.*” (Emphasis added.)

Also on page 169 of the Transcript lines 23-26 the following testimony appears:

“Q. They were moved by persons under your direction?

A. *Yes, Miller Scraper and Manufacturing Company.*” (Emphasis added.)

On page 10 Appellee states that the effect of Civil Code Section 3440 between the parties was the sole issue before the District Court. This was the issue submitted to the Bankruptcy Referee and his Conclusion of Law and Order (Tr. p. 16, lines 1-19) were affirmed by the District Court. (Tr. p. 36, lines 7-11.)

While the Referee found there was no immediate rather than actual change of possession, it cannot be implied that he concluded that an actual change of possession occurred. The District Court affirmed the Finding of the Referee that there was no immediate change of possession and it follows that there was no actual change of possession required by C. C. Section 3440. Furthermore, this Code Section also requires *continued* change of possession in addition to actual change of possession, and the District Court also affirmed the Finding of the Referee that there was no *continued* change of possession.

Appellee finally asserts that the naming of the Bank in the Invoices of Miller operated to give Bank its security interest. The terms of Paragraph III (Tr. p. 207, lines 5-21) of the Amendatory and Supplemental Agreement dated April 4, 1952 set forth the fact of purchase of the scrapers by Consolidated from Miller and the passage of title from Miller to Con-

solidated. There could be no contract between Miller and the Bank for the purchase of the scrapers because Miller had contracted to deliver the same and pass title to Consolidated under the provisions of Paragraph III above-mentioned. Furthermore, the Bank had no obligation whatsoever to purchase the scrapers since there was no sale of any scrapers made by Miller to the Bank. The Bank had constructive notice of the provisions of Paragraph III of the Amendatory and Supplemental Agreement dated April 4, 1952, due to its recordation with the County Recorder of Fresno County, California (Tr. p. 213, lines 7-11). The Bank could therefore acquire no title or any security interest from Miller since under Paragraph III of the above-mentioned Agreement the latter had agreed to sell and transfer all right, title and interest in the scrapers to Consolidated. Furthermore, the testimony of W. A. Reynolds, President of Consolidated, conclusively proves that any security interest obtained by the Bank was acquired from Consolidated and not from Miller, and the security interest of the Bank came into being when the Trust Receipts were delivered to Bank by Consolidated. His testimony (Tr. p. 92, lines 9-22) is as follows:

“Q. At the time the papers were delivered to the Bank of America in Selma, at that time did they immediately withdraw funds and deposit them to the account of Miller Scraper Co.?

A. Yes.

Q. At that time did the bank retain the Trust Receipts and attached documents?

A. Yes.

Q. *At that time* you considered these articles floored?

A. Yes.

Q. You considered that you held them as trustee for the bank?

A. We did.

Q. Do you know Mr. Jess Forrest, manager of the Selma branch of the bank?

A. Yes.

Q. Is he the one your company dealt with?

A. Yes." (Emphasis added.)

Counsel for Appellee was present (Tr. p. 76, lines 6-7) at the hearing before the Bankruptcy Referee on October 14, 1954 when the above testimony of the President of Consolidated was adduced, and he made no objection to the same. At the same hearing James R. Reynolds, Assistant to the President of Consolidated, testified (Tr. p. 120, lines 4-13) substantiating the above testimony of the President of Consolidated as follows:

"Q. Specifically, with respect to each of the documents you have before you, being Exhibits A through E for the Bank of America, did you specifically take those documents to Mr. Forrest of the Bank of America?

A. To the best of my knowledge, yes, sir.

Q. And what happened when you took them to the bank?

A. They were processed according to the agreement *which we had* with the bank." (Emphasis added.)

The above testimony conclusively proves that any security interest acquired by the Bank was derived

from Consolidated and not from Miller, the Vendor of the scrapers to Consolidated, the Vendee, under Paragraph III of the Agreement dated April 4, 1952. Counsel for the Appellee also offered no objection to this substantiating testimony of James R. Reynolds. The Referee having held that the title of Consolidated was void and his ruling having been affirmed by the District Court, the derivative security interest asserted by the Bank in the scrapers in the possession of Appellant is also void. Under these circumstances the conceded delivery of scrapers by Miller to Consolidated is of no consequence, and due to the lack of factual similarity the authorities cited by Appellee on page 12 of its Brief are not in point.

II.

THE PROVISIONS OF CIVIL CODE SECTION 3440 ARE RELEVANT TO VALIDATE SECURITY INTEREST OF BANK.

Appellee contends that Civil Code Section 3440 is irrelevant and places reliance for this statement on italicized language in the excerpt from *Chichester v. Commercial Credit Co.*, 37 Cal. App. (2d) 439 on page 13 of its Brief. The Court stated, preceding the italicized language, that Civil Code Section 3440 had not been repealed. In the italicized part of its Decision the Court merely states that Trust Receipts are not governed by any existing laws relating to other types of *security interest transactions*. The Court specifically states that "Sections 3440, 2955, 2977, and 2920 of the Civil Code are still effective." It is to be noted

that C.C. 3440 was an extremely lengthy section (1925 Statutes of California, Chapter 389, pp. 725-726), when the Uniform Trust Receipts Act was adopted in 1935, and in the margin of pages 725 and 726 there is found *five different classifications* of the subject matter contained in the Section as follows: Transfers presumed fraudulent, Transfers of wine, Bulk Sales, Public Auctions, and Transfers under Order of Court. A somewhat similar classification of the contents of C.C. Section 3440 is to be found preceding the Section in Deering's 1949 Civil Code, pages 624-25. As further evidence of the broad scope of C.C. 3440, it is to be noted that the Section was divided into two parts in 1951 (1951 Statutes of California, Chapter 1687, pp. 3884-86) and the first part relating to Transfers presumed fraudulent because of lack of actual and continued possession is still designated as Civil Code Section 3440, while the balance of the former Section relating to Bulk Sales, etc., is now designated as Civil Code Section 3440.1. It is therefore evident that the italicized language in the *Chichester* case *only* pertains to any part of the Civil Code Section relating to a security interest transaction and in no way encompasses or affects the first requirements of the Section of the necessity of actual and continued change of possession in a vendee to validate a sale as against creditors of the vendor.

III.

THE REFEREE PROPERLY CONCLUDED THAT THE BANK WAS ESTOPPED FROM ASSERTING ANY BETTER TITLE THAN CONSOLIDATED.

Appellee in Part III of its Opening Brief (pages 16-18) contends that the factual situation does not justify application of the Doctrine of Equitable Estoppel. In support of this, it cites *Safway Steel Products, Inc. v. Lefever*, 117 Cal. App. (2d) 489 which defines the accepted elements of act, reliance and damage which must be proven before a true estoppel will be allowed. While the rule is clearly stated, there is absolutely no justification for its application to these facts.

The Referee has found, and the District Court affirmed, the sale from Miller to Consolidated to be void for lack of change of possession and that the Bank at all times was aware of this fact. From this, the Referee concluded it was estopped to claim any better title. Appellee was not, as it states (page 16), "estopped to assert its security interest in these scrapers"; it was merely *denied the right to assert a better title* than that of Consolidated.

The word, "estop" has long been used to describe any situation whereby one party is precluded from acting or asserting a right. Without comprehending a formal application of the Doctrine of Equitable Estoppel, many similar defences e.g., laches, ratification, waiver, election of remedies, although not estoppels in the true sense, bear such a general relationship and carry such a similar effect that they are consid-

ered as quasi-estoppels, 18 Cal. Jur. (2d) 403; 31 C.J.S. (Estoppel § 2) 193. Thus, as pointed out in 3 C.J.S. 241:

“... Although it is sometimes denominated an estoppel or equitable estoppel, the principle that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which, except for his misconduct, would not be available, *is not an estoppel in a strict and technical sense.*” (Emphasis added.)

In the present instance California Civil Code § 3440 renders a transfer of personal property unaccompanied by an actual and continued change of possession *conclusively void* as against the transferor's creditors. The reliance of creditors is not an element, nor does the statute depend for its effect upon the presence of the formal elements of an equitable estoppel. As the Court states in *Ruggles v. Cannedy*, 127 Cal. 290 quoting from Chancellor Kent (page 297):

“... The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession. . . . It necessarily creates a secret encumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.”

In *Hendricksen v. State Subsidiary, Ltd.*, 3 Cal. (2d) 59, the vendor of personal property, left in possession by the defendant-purchaser, promptly mortgaged the property to the plaintiff. The Court in denying the purchaser the right to assert his title stated (page 60):

“Defendant, however, must yield its claim to the superior claim of plaintiffs, because it was negligent in leaving Fox in charge of both the ranch and the said livestock without any evidence of change of title to or possession of the chattels. The court below properly held that under such circumstances defendant *is estopped to assert its claim* over that of plaintiffs. (*Washington etc. Co. v. McGuire*, 213 Cal. 13, 15 (1 Pac. (2d) 437).) This is true notwithstanding the fact that the consideration for the chattel mortgage was forbearance to sue upon a preexisting debt. (*Smitton v. McCullough*, 182 Cal. 530 (189 Pac. 686).)” (Emphasis added.)

It is apparent that the Bank, knowing of the lack of change of possession, could have corrected this situation at any time. Its failure to do so rendered the sale from Miller to Consolidated absolutely and conclusively void as to the former's creditors. Allowing the Bank to assert any interest whatever in the face of this would defeat and render completely meaningless the requirement of change of possession. Such a safeguard would disappear and a seller holding possession could obtain credit on the strength of his apparent ownership while the purchaser or encumbrancer could defeat the creditor's recovery at any

time simply by coming forward with his document of title.

Considered in light of the foregoing, it is apparent that the Referee acted properly in estopping or refusing to allow the Bank from asserting any better title than that acquired by Consolidated, and this is true whether his conclusion rests upon simple equitable grounds or is compelled as the result of an estoppel created by statute.

IV.

THERE WAS NO SUFFICIENT CHANGE OF POSSESSION IN COMPLIANCE WITH CIVIL CODE SECTION 3440.

Before proceeding to answer Part IV of the Brief of Appellee, Appellant desires to make a brief comment upon the first paragraph on page 19 of the Brief concerning the District Court not being bound by the Findings of Fact of the Referee relating to change of possession of the scrapers required by Civil Code Section 3440. It is to be noted that the District Court in that portion of its Order (Tr. p. 35, lines 8-32 and p. 36, lines 1-11) appearing verbatim on pages 3-4 of the Brief, *adopted* the Conclusion of Law of the Referee based upon his Findings of Fact of lack of immediate and continued change of possession required by the Code Section.

Appellee states that if it assumes Civil Code Section 3440 is relevant, then under the two cases cited on pages 19-21 of its Brief there was a sufficient change of possession of the scrapers to comply with the re-

quirements of the Section. It is unnecessary to unduly lengthen the within Brief by commenting upon the lack of any factual similarity in either of these two cases because the District Court has affirmed the Findings of Fact, Conclusions of Law and Order of the Referee of the absence of immediate and continued change of possession of the scrapers in compliance with the Code Section. Neither the Bank nor Consolidated has taken an appeal from the Order of the District Court and hence the issue of change of possession is no longer debatable.

V.

NO REPLY BY APPELLEE TO PART III OF APPELLANT'S OPENING BRIEF.

Part III of Opening Brief of Appellant covers the argument and several authorities cited by Appellant in support of one of the errors of the District Court relative to *derivative* title from Consolidated to Bank upon which his appeal is predicated. By its failing to answer the Argument, Appellant can only assume that Appellee concedes that the authorities cited are in point, and his analysis, discussion of and comments upon the factual situation and cases support his appealing this error of the District Court.

CONCLUSION.

Appellant respectfully submits that the portion of the *inconsistent* Order appealed from of the District Court should be reversed. It affirmed the Decision of the Bankruptcy Referee that Consolidated had no valid title in any of the scrapers but, nevertheless reversed his Order adjudicating the Trust Receipts of Appellee void. No Appeal was taken by either Consolidated or the Bank from the Decision of the District Court affirming the Decision of the Bankruptcy Referee that the title of Consolidated was void because of non-compliance with Civil Code Section 3440. Since the validity of the Trust Receipts of the Bank received from Consolidated depended upon existing *valid title* in Consolidated, which was lacking, the alleged *derivative* security interest from Consolidated which the Bank asserts under its Trust Receipts is also void. In affirming the Decision of the Bankruptcy Referee that the sale of the scrapers from Miller to Consolidated was void, the District Court erred and *was inconsistent* in ruling that Consolidated could execute valid Trust Receipts to the Bank.

Appellant Bankruptcy Trustee respectfully submits that the portion of the *inconsistent* Order of the District Court adverse to Appellant should be reversed.

Dated, October 8, 1957.

Respectfully submitted,

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Attorneys for Appellant.

No. 15,456

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate
of Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLI-
DATED DISTRIBUTORS, INC., a corpora-
tion,

Appellees.

APPELLANT'S REPLY BRIEF
TO BRIEF OF APPELLEE
CONSOLIDATED DISTRIBUTORS, INC.

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FILED

OCT 14 1957

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**APPELLANT'S REPLY BRIEF
TO BRIEF OF APPELLEE
CONSOLIDATED DISTRIBUTORS, INC.**

It seems clear, from a reading of all the briefs submitted in this case, that the legal issue presented in the case at Bar has never been decided by this Court. Neither the Appellee nor the Appellant has brought to the attention of the Court any case involving a similar factual situation to the one presented in the present proceedings. For this reason, Appellant believes that a thorough-going analysis of the factual

situation in the present case is necessary to determine the applicability of the existing law to resolve the issue presented.

For purposes of clarity, let it be remembered that Miller was the manufacturer-seller, Consolidated was the financed-purchaser and that the Bank financed the purchase of the scrapers by Consolidated from Miller. Arrangements for purchase by Consolidated were made under a Trust Receipt transaction. The mechanics of that transaction were thoroughly reviewed in previous Briefs and it has been decided by the Referee in Bankruptcy and affirmed by the District Court that, as between Miller and Consolidated, compliance with California Civil Code Section 3440 was required and was not met, and that, therefore, the sale between Miller and Consolidated was null and void. This decision results from the fact that there was no immediate or continued change of possession of the scrapers from Miller to Consolidated, as required by Section 3440 of the Civil Code. As a result of this decision by the District Court it was decreed that Consolidated had no right, title, or interest in the scrapers. The legal question is whether or not the Bank has a valid security interest in the scrapers as a result of its Trust Receipt transaction with Consolidated. To answer this question the following analysis is submitted.

Chichester v. Commercial Credit Co., 37 C.A. 2d 439 (1940), tells us that the security interest of the Bank as entruster under the Trust Receipt trans-

action can be derived from the financed-purchaser as Trustee or from any other person. This rule of law is set forth in Civil Code Section 3014 (1) (b) (ii). It is upon this rule of law set forth in the *Chichester* case and the Civil Code that the Appellees base their case. Let us examine this rule of law as it relates to the facts in the present case.

In all cases which have been brought to the attention of the Court involving Trust Receipt transactions, it was the financed-purchaser as Trustee under a Trust Receipt transaction with a financing company that became bankrupt; it was the Bankruptcy Trustee of the financed-purchaser, representing the creditors of the financed-purchaser, who claimed title to property as against another creditor of the financed-purchaser, to wit, the financing company. In none of the cases submitted has the finance company claimed a valid security interest against the creditors of the manufacturer-seller as represented by its Trustee in Bankruptcy. Appellant submits these distinctions are significant and control the outcome of the present litigation. It will be noted by the Court that in the *Chichester* case and other authorities submitted that the financed-purchaser obtained *actual possession* of the goods in which the financing company claimed a security interest under its Trust-Receipt transaction with the financed-purchaser. Appellees stress the point that in the *Chichester* case the financed-purchaser had neither title nor possession of the goods when he executed his Trust Receipt document giving the finance company a security interest in said goods. It

is agreed that it is not necessary, nor should it be, for the financed-purchaser to have title and possession before he executes a Trust-Receipt document, *since this is the method by which the financed-purchaser obtains title and possession to the goods*. The point is, that after the execution of the Trust-Receipt document, the financed-purchaser in the *Chichester* case, and in other authorities cited, *actually received possession of the goods from the manufacturer-seller*. The *Chichester* case and the other authorities cited by Appellee tell us that after the financed-purchaser has obtained possession of the goods, and then is rendered bankrupt, that his Trustee is Bankruptcy, representing his creditors, will not prevail as against his other creditor, the financing company. *This is by reason of the fact that the Trust Receipt transaction between the parties gave the financing company a valid security interest good as against all other creditors of the financed-purchaser*. In other words, as between creditors of the financed-purchaser the beneficiary of the Trust-Receipt document prevailed. Herein lies the distinction between the cases cited to the Court and the facts in the case at Bar.

As a result of the Trust-Receipt transaction between Consolidated and the Bank, Consolidated became indebted to the Bank. A debtor-creditor relationship then existed between Consolidated, as a financed-purchaser, and the Bank who financed the purchase for Consolidated. In the cases submitted by Appellees conflicting claims to the goods in the hands of the Bankrupt were presented by two sets of creditors

of the Bankrupt. In the present case, the conflicting claims to the goods are between the Bank, a creditor of the financed-purchaser, and the creditors of Miller, the manufacturer-seller, represented by the latter's Trustee in Bankruptcy, the Appellant. *The claims are not between two sets of creditors of the Bankrupt. There is no debtor-creditor relationship between Miller and the Bank as a result of the Trust Receipt transaction between the Bank and Consolidated.* The Bank is not seeking to establish a valid security interest against other creditors of Consolidated but against the creditors of Miller who is not indebted to the Bank. Therefore, different legal principles are applicable to each situation. The Bank by obtaining a Trust Receipt from Consolidated *protected itself against a claim to the goods by other creditors of Consolidated.* As between creditors of the same debtor, the beneficiary of a Trust-Receipt document is held to prevail and with this point of law, Appellant has no quarrel. It should be pointed out that it is exactly in this situation that arguments of Appellees based on the *Chichester* case and Civil Code, Section 3014 (1) (b) (ii) apply. The security interest of the entruster in this situation may properly be derived from the Trustee or from any other person *without endangering the entruster's security interest as against other creditors of the Trustee.*

The Trust-Receipt document, however, should not be held to establish a valid security interest in the goods for the Bank as against the claims of the creditors of Miller. Suppose a creditor of Consolidated

intending to loan money to Consolidated conducts a search to ascertain the outstanding indebtedness of the latter? The Statement of Trust Receipt Financing filed with the Secretary of State would warn this creditor and give him notice that Consolidated might be indebted to the Bank as a beneficiary under any outstanding Trust Receipts. As between the Bank and the searching creditor, the Bank, by reason of its Trust Receipt transaction with Consolidated, has established a valid security interest against the other creditors of Consolidated. For commercial convenience, the Trust Receipt law did away with the necessity for a change of possession *between the financed-purchaser and the financing company*. Should this same rule apply when the Bankrupt is not the debtor under the Trust-Receipt transaction, but rather the manufacturer-seller and supplier of the debtor? Appellant thinks not. Suppose a creditor of Miller, the manufacturer-seller, had made inquiry of the office of the Secretary of State to ascertain if Miller was named as Trustee in any Statement of Trust Receipt Financing filed pursuant to Civil Code, Section 3016.9, he would receive a negative reply from the Secretary of State, as Miller could not be a party to a Trust Receipt covering any of the scrapers because of the sales agreement entered into by it with Consolidated. (T.R. p. 191-213.) No creditor of Miller could have been put on notice of any outstanding lien under Trust Receipts in favor of the Bank on goods remaining in the possession of Miller, the manufacturer-seller. He would have no notice that a debtor-creditor rela-

tionship might exist between the Bank and Miller, the manufacturer-seller. He had no information that although a transfer of possession from the manufacturer-seller to Consolidated has not been effected, that nevertheless, the goods remaining in the possession of Miller, the manufacturer-seller, are encumbered with a lien in favor of the Bank. The reason why he has no knowledge of these things is simply because the Trust Receipt transaction, by its very nature, affects the rights and liabilities of Consolidated, the financed-purchaser, and *only* its creditors.

It seems clear then, that a Trust Receipt transaction is not designed for the protection of the creditors of the manufacturer-seller but rather for the creditors of the financed-purchaser. *Section 3440 of the Civil Code was designed to protect the creditors of the manufacturer-seller and it is the rights of these creditors of Miller, the Bankrupt, that are at issue.*

After an analysis of the facts in the case at Bar, it seems apparent that a condition precedent to a valid Trust Receipt transaction is compliance with Section 3440 of the Civil Code between Miller, the manufacturer-seller, and Consolidated, the financed-purchaser, required a change of possession between the parties.

It is the position of Appellant, *as to creditors of Miller*, that the validity of the security interest of the Bank was dependent upon an immediate and continued change of possession between Miller and Consolidated in compliance with Section 3440 of the Civil Code which the District Court ruled had not occurred.

Appellant respectfully submits (1) that the District Court erred in holding that the *invalid derivative security interest* of the Bank was effective as against the Bankruptcy Trustee of Miller, and (2) that this Honorable Court should reverse the *inconsistent* portion of the Order of the District Court from only which Appellant has appealed.

Dated, October 9, 1957.

Respectfully submitted,

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No. 15,456

IN THE

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Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

JUN 14 1957

PAUL P. THOMPSON, CLERK

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No. 15,456

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOSEPH L. JOY, Trustee of the Estate
of Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

VS.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLIDATED
DISTRIBUTORS, INC., a corporation,

Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The Bankruptcy Receiver filed his Petition for order to Show Cause, to Show Nature, Extent and Validity of Alleged Lien (Tr. pp. 7-8) and Consolidated Distributors, Inc., and Bank of America N.T. & S.A. were ordered to show and establish the amount and validity of their liens upon assets of the bankrupt corporation (Tr. p. 9). The Bankruptcy Referee entered an Order (Tr. pp. 11-17) determining that neither Consolidated Distributors, Inc., or Bank of America N.T. & S.A., had any right, title or interest in the 42 scrapers described in Exhibit "A" attached to his Order. Petitions to Review the Order of the

Referee were filed by Consolidated Distributors, Inc., and Bank of America N.T. & S.A. The District Court (Tr. pp. 32-38) affirmed the Order of the Referee determining that Consolidated Distributors, Inc., had no right, title or interest in any of the 42 scrapers and reversed the Order of the Referee adverse to Bank of America N.T. & S.A. Pursuant to the provisions of 11 U.S.C.A. 47, Appellant filed his Notice of Appeal *only* from that portion of the District Court Order reversing the ruling of the Referee adverse to Bank of America N.T. & S.A. No appeal was taken by Consolidated Distributors, Inc., from the Order of the District Court adverse to it.

STATEMENT OF QUESTION PRESENTED.

May a holder of Trust Receipts upon property described therein, whose alleged secured interest was acquired from a Vendee having no valid title, take the property from the Bankruptcy Trustee of the Vendor?

STATEMENT OF FACTS.

Miller Scraper & Mfg. Co., Inc., a corporation, the bankrupt, hereinafter referred to as "Miller", has been engaged in manufacturing road scrapers and farm equipment. On March 20, 1952 its predecessor entered into an agreement (Tr. pp. 191-204) to sell his entire output or production of scrapers manufactured by him to Industrial Equipment Co., Inc., a corporation, subsequently known as Consolidated Distributors

Inc., a corporation, hereinafter referred to as "Consolidated", and said agreement was amended and supplemented by an agreement (Tr. pp. 204-213) dated April 4, 1952. Paragraph 3 of the agreement dated March 20, 1952, as amended (Tr. p. 207) provided that all scrapers were "to be delivered to the Distributor F.O.B. Carrier, at Selma, California, or are to be stored and/or warehoused at the Yard of the Manufacturer at the direction of the Distributor, and that, in either event, title thereof shall pass to the Distributor upon the occurrence thereof." During June, 1952, Consolidated set up a selling organization and established an office in a portion of a small office building occupied by Miller on a four-acre tract of land upon which Miller had its plant for manufacturing the scrapers. Upon completion of each scraper it was moved to an unfenced, open area on a portion of the premises located about the center of the four-acre tract set aside for this purpose. Each scraper was immediately inspected by Consolidated and was accepted or rejected, depending upon whether mechanical defects were discovered.

On the 1st and 15th of each month invoices were received by Consolidated direct from Miller, which Consolidated attached to a Trust Receipt which was delivered by Consolidated to Bank of America N.T. & S.A., a corporation, hereinafter referred to as "Bank". Immediately upon delivery of the Trust Receipt to Bank, the account of Miller at Bank was credited to a sum equal to 90% of the invoice price of each scraper listed upon the Trust Receipt. Between

July, 1952 and September, 1954 a representative of Bank made monthly inspections of the scrapers situated on the above-mentioned open, unfenced area, and knew that all scrapers were intermingled with other equipment of Miller. In June 1953 Consolidated moved its offices, vacating the Miller premises and leaving the scrapers in the latter's possession and control. At all times thereafter until Bankruptcy, the scrapers remained in the sole and exclusive possession of Miller. When Miller was adjudicated a bankrupt there were about 42 scrapers which came into the possession of Appellant Bankruptcy Trustee, described in Trust Receipts held by Bank, located on the aforesaid site. Consolidated and Bank claimed possession of all scrapers.

Upon a Petition of the Bankruptcy Receiver filed with the Bankruptcy Referee the latter issued his Order requiring Consolidated and Bank to establish the nature, amount, extent and validity of any claim against the bankrupt and of any lien claim or security upon the assets of the bankrupt estate. Following lengthy hearings the Referee in his Order Determining Nature, Extent and Validity of Claims to Personal Property (Tr. pp. 11-16) included as one of his Findings that an employee of Bank making monthly inspections saw that the scrapers were intermingled with other equipment of the bankrupt. The Referee concluded as Matters of Law that (1) the title asserted by Consolidated in the scrapers was void because there had been no immediate and continued change of possession of all scrapers by Consolidated pursuant to

California Civil Code Section 3440, and (2) that since Bank at all times had knowledge of lack of change of possession it was estopped from claiming any better title than Consolidated. Consolidated and Bank filed Petitions to Review the Order of Referee. His decision was affirmed by the District Court as to Consolidated and reversed as to Bank. (Tr. pp. 32-38.)

ARGUMENT.

I.

**THE DISTRICT COURT ERRED IN FAILING TO AFFIRM THE
FOURTH AND SEVENTH FINDINGS OF FACT OF THE BANK-
RUPTCY REFEREE.**

(a) Fourth Finding of Fact.

Both documentary (Tr. p. 207, lines 1-20) and oral (Tr. p. 91, lines 17-31 and p. 92, line 18) evidence introduced at the hearing before the Bankruptcy Referee support his Fourth Finding of Fact (Tr. p. 13, lines 14-29) of the purchase of the scrapers by Consolidated from Miller and the alleged security interest under the Trust Receipt being derived by the Bank from Consolidated. Nevertheless, the District Court disregards this positive evidence that the security evidence of the Bank flowed from Consolidated and held that the alleged security interest of the Bank was not a derivative interest because the invoices were made direct to the Bank. This practice was merely a matter of form only, as is shown by the evidence that the invoices were turned over by Miller to Consolidated to be attached to Trust Receipts prior to delivery to the Bank. Since, under amended paragraph 3 of the Agreement of Sale

(Tr. p. 207, line 20) between Miller and Consolidated, title to the scrapers was to pass direct from Miller to Consolidated upon delivery, storage and/or being warehoused, the invoices were delivered direct to Consolidated and not to the Bank, and it clearly appears from the testimony of the President of Consolidated (Tr. p. 92, lines 15-18) the alleged security interest of the Bank came into being at the moment the Trust Receipts were delivered to the Bank, at which time Consolidated then became trustee for the Bank. The Bank, in fact, was not even aware of the transaction, nor in any way responsible to Miller, until such time as Consolidated executed and delivered the Trust Receipts to the Bank.

The evidence clearly supports the Fourth Finding of Fact of the Bankruptcy Referee that Consolidated purchased the scrapers from Miller, and his Conclusion of Law that the sale being void, the Bank could not obtain any title which Consolidated failed to acquire. The District Court, in holding that the alleged security interest of the Bank was acquired from Miller against the evidence which conclusively proves that Miller agreed to transfer title to Consolidated, erred in failing to affirm the Fourth Finding of Fact of the Bankruptcy Referee.

(b) Seventh Finding of Fact.

The District Court, in failing to affirm the Seventh Finding of Fact of the Bankruptcy Referee (Tr. p. 15, lines 8-14) and holding the Bank acquired its alleged security interest from Miller and not from Consoli-

dated, disregards the undisputed evidence of knowledge of the Bank by means of monthly inspections (Tr. p. 178, lines 27-31, and p. 179, lines 1-5) that the scrapers were intermingled at all times with other assets of Miller, the bankrupt. The Bank therefore had knowledge of lack of possession by Consolidated, from whom it received its Trust Receipts, and it is not the purpose of the law of Trust Receipts to permit any holder of a Trust Receipt to assert a valid security interest in property which is not in the possession of the person executing the Trust Receipt, known as the Trustee. How can it be said that Consolidated is a Trustee of the Bank when it lacked possession of the scrapers described in the Trust Receipts, and the Bank, under the Seventh Finding of Fact of the Bankruptcy Referee, knew the same were located on the premises of Miller, the bankrupt, intermingled with other assets? This Seventh Finding of Fact is incorporated in the Conclusions of Law of the Bankruptcy Referee, to wit: "the Bank of America NTSA was aware at all times of the facts concerning said lack of change of possession" (Tr. p. 16, lines 6-8). The District Court therefore erred in failing to affirm the Seventh Finding of Fact of the Bankruptcy Referee, thus validating the Trust Receipts which the Bank received direct from Consolidated with full knowledge at all times that "from 1952 to December of 1954 * * * saw that said scrapers were intermingled with other equipment of the above bankrupt and *located on the premises of the above bankrupt.*" (Emphasis added.) (Tr. p. 15, lines 11-14.)

II.

THE DISTRICT COURT ERRED IN OVERRULING THE CONCLUSION OF LAW OF THE BANKRUPTCY REFEREE OF ESTOPPEL AGAINST THE BANK.

The Bankruptcy Referee concluded, as a matter of law (Tr. p. 16, lines 8-11) that the Bank was estopped from claiming any better title than Consolidated because the Bank had knowledge at all times of the lack of change of possession. This Conclusion of Law is based upon the Seventh Finding of Fact of the Bankruptcy Referee discussed in the preceding paragraph and based upon actual knowledge of the Bank during its monthly inspection that the scrapers described in the Trust Receipts were always "located on the premises of the * * * bankrupt." (Tr. p. 15, lines 13-14.)

The Bank could have insisted that all of the scrapers be separated from other property of the bankrupt and moved to another area on the four-acre tract and surrounded by a fence with a sign or signs reading "Property of Consolidated Distributors, Inc." Had the Bank demanded that the practice of Consolidated approving and consenting to the continued intermingling of its scrapers with property of the bankrupt cease and the scrapers kept within an enclosed area at all times, creditors of the bankrupt corporation, whom Appellant Trustee represents, would have been apprized of property being located on the premises of the bankrupt belonging to Consolidated. The continued intermingling of the scrapers gave no notice that the same had been sold to and were owned by Consolidated.

Furthermore, merely because the Bank had complied with the provisions of the Trust Receipts Act gave no notice to creditors of the bankrupt that the intermingled scrapers owned by Consolidated were subject to Trust Receipts held by the Bank. Only Consolidated, as Trustee, and the Bank as Entruster, would appear in the Statement of Trust Receipt Financing filed with the Secretary of State, and any creditor making inquiry of his office would find no record of the Bank financing any Trust Receipt transactions of the acquisition of scrapers by Consolidated from Miller, the bankrupt. To permit the Bank to claim the scrapers in the possession of Appellant Bankruptcy Trustee by virtue of its Trust Receipts would enable the Bank to enforce what amounts to a secret lien on all of the scrapers. Such action would be contrary to the statement made by this Court in *Stepp v. McAdams* (9 CA) 88 F. (2d) 925, and on page 928 the Court said:

“The law frowns upon secret charges against property. It is well established that equitable liens will not be enforced against creditors without notice, either actual or constructive.” (Emphasis added.)

The District Court therefore erred in the pending matter by overruling the Conclusion of Law of the Bankruptcy Referee that the Bank is estopped from claiming any better title than Consolidated has validated a secret lien of the Bank on the scrapers intermingled at all times with property of Miller, the bankrupt.

III.

**THE DISTRICT COURT ERRED IN HOLDING THE INTEREST OF
THE BANK WAS NOT DERIVATIVE FROM CONSOLIDATED.**

Heretofore, in Paragraph I, Appellant Trustee has discussed the provisions of amended Paragraph III (Tr. p. 207, lines 1-20) of the Sales Agreement between Miller and Consolidated providing for the passage of title to the scrapers *direct* from Miller to Consolidated. The attention of this Honorable Court was directed to the procedure followed (1) by Miller delivering all invoices *direct* to Consolidated and not to the Bank; (2) Consolidated then attaching the invoices and Trust Receipts and delivering them to the Bank, and (3) the alleged security interest of the Bank coming into being *at the time of each delivery*. (Tr. p. 92, lines 9-18 and p. 120, lines 9-12.) The documentary and oral evidence clearly supports the decision of the Bankruptcy Referee that the invalid security interest of the Bank was derivative from Consolidated and not from Miller, and the District Court clearly erred in holding that the title and interest of the Bank was not derivative from Consolidated. (Tr. p. 37, lines 20-22.)

Since a Trust Receipt is similar to a Chattel Mortgage in that a security interest is transferred for the purpose of securing an obligation to repay money, the general rule relating to the requirement that the validity of a Mortgage must depend upon the validity of the title of the mortgagor also applies with respect to the necessity of valid title being vested in the owner of property upon which it executes a Trust Receipt, the following general rule relating to Chattel Mort-

gages is clearly applicable to Trust Receipts; it is stated in 14 C.J.S., on page 614, that "a chattel mortgagor can convey by mortgage only that interest which he possesses in property"; and on page 615, "it is the duty of the mortgagee or his assignee to see that the mortgagor has good title to the property which he undertakes to mortgage."

In *Winchester Packing Co. v. Moyer, et al.*, (Kansas Supreme Court), 187 Pac. Rep., 680 the facts disclose that a stock of goods and fixtures were sold without compliance with the Bulk Sales Act and the buyer executed a chattel mortgage on the fixtures as security for money borrowed to pay the purchase price. The Court held that the mortgage was void because of the invalid title to the fixtures upon which the mortgagor (the buyer) executed a mortgage. On page 681 the Court said:

"But, as its title could rise no higher than its source, Phillips, and as Phillips had no right whatever to use the property to secure the bank, so also the bank had no right as against existing creditors to look to such property for security. Under the statute (Gen. Stat. 1915 § 4894) the sale was void as to existing creditors who had the same right to proceed against the property as if it were still held by Moyer. Hence, the source of the bank's title failing, it must step aside for the plaintiff, whose claim is substantially larger, than the amount realized from the sale under the levy." (Emphasis added.)

In *Ballou v. Andrews Banking Co.*, 128 Cal. 562, the facts disclose that there was a transfer of personal

property within one month prior to the commencement of insolvency proceedings and not in the usual and ordinary course of business. The facts further disclose that after the property had been transferred to Schwartz he subsequently transferred a portion of the property to the defendant which had knowledge of the previous invalid transfer to Schwartz. The Supreme Court affirmed the decision of the lower Court, holding that the plaintiff, as assignee for the benefit of creditors of the original transferor, was entitled to the value of the assets transferred to Schwartz and subsequently transferred to defendant, and on page 566 said:

“In any event, under the circumstances, the transfer to Schwartz being void, the defendant took no greater title than Schwartz had.” (Hobart v. Tyrrell, 68 Cal. 12; Brown v. Bank of Napa, 77 Cal. 544.)” (Emphasis added.)

In *Brown v. Bank of Napa*, 77 Cal. 544 there was a transfer of personal property by Reed to Chapman without any change of possession. Subsequently, the defendant, Bank of Napa, had the property transferred to it. The Court found that the bank had notice of the invalidity of Chapman in the title to the property which Reed had transferred to him and affirmed the judgment in favor of the plaintiff as assignee of insolvency of Reed to recover damages from the defendant bank for conversion of the property. On page 547 the Court said:

“But such purchaser or encumbrancer must show his good faith by parting with his money, or

money's worth, on acquiring the property *without notice of any infirmity in the vendor's title*. We are of opinion that *the evidence shows that the bank had notice of the infirmity of Chapman's title*, and it is in effect so found." (Emphasis added.)

In *Della v. Home Bank of Porterville*, 105 Cal. App. 106, the facts disclosed a violation of California Civil Code Sec. 3440 because of absence of actual and continued change of possession. In affirming judgment for the plaintiff against the defendant bank, the Court, on page 109 said:

"There is no question in this case that there was no immediate or continued change of possession of the cattle from Shepard to the bank and that the attempted sale to the bank was fraudulent and void as to the other existing creditors of Shepard. *The attempted sale must be treated as though it had never taken place* and the bank must be regarded as holding the money it received from the sale of the cattle, in trust for the benefit of the creditors of Shepard. (*Allee v. Shay*, 92 Cal. App. 749 (268 Pac. 962).)" (Emphasis added.)

In *Renaldi v. Goller*, 48 Adv. Cal. Rep. 273, the lessees of vacant property gave a chattel mortgage on a building to be constructed thereon to secure funds borrowed for its erection from one Goller. About three years later the lessees abandoned the leased property upon which the building had been erected and subsequently plaintiffs, the owners, sued the lessees and the mortgagee, Goller, to quiet title to the premises. The California Supreme Court in affirming the Judgment

for plaintiffs in the lower Court held that the lien of the mortgagee was *derivative* from the lessees and his right or title was based upon whatever interest the lessees had in the property and building when mortgagee asserted his claim. On page 279 the Court said:

“The rights of the chattel mortgagee *are derivative*. He cannot assert a greater right against the lessor than can the lessees. A mortgagee from a tenant has no greater right to remove trade fixtures from the premises after the tenant has surrendered possession to the landlord than the tenant himself would have. *Whatever right or title the mortgagee from the tenant may have cannot rise higher than its source*, and is measured by what the rights of the tenant would be at the time the mortgagee asserts his claim.” (Donahue v. Hardman Estate, 91 Wash. 125, 128 (157 P. 478).) (Emphasis added.)

So, in the pending appeal, the rights of the Bank are derivative from Consolidated, the Trustee, under the Trust Receipts. Whatever right or interest the Bank may have cannot rise higher than its source, to wit, the title of Consolidated in the scrapers described in the Trust Receipts. Since the District Court affirmed (Tr. p. 36, lines 7-11) the Order of the Bankruptcy Referee (Tr. p. 16, lines 15-19) holding that Consolidated had no right, title or interest in the scrapers the derivative security interest of the Bank under its Trust Receipts of Consolidated is consequently void.

IV.

THE DISTRICT COURT ERRED IN ITS CONCLUSION OF LAW THAT THE INTEREST OF THE BANK IS VALID AS AGAINST APPELLANT TRUSTEE AND THE CREDITORS OF THE BANKRUPT ESTATE.

Appellants' Fourth Assignment of Error follows from that considered in the previous Section of the within Brief, but is directed to the Conclusion and Order of the District Court validating the Bank's title as against Appellant, which conclusion, Appellant submits, is contrary to law and unsupported by the facts.

The Referee concluded that there was no immediate or continued change of possession of the scrapers from Miller to Consolidated, or any other person, as required by Section 3440 of the California Civil Code. He therefore decreed that the sale from Miller to Consolidated was void and that Consolidated had no right, title or interest in the scrapers.

The District Court affirmed the Referee's Findings of Fact and Conclusions of Law relating to the right, title and interest of Consolidated in the scrapers. Thus it has been decided that, as between Miller and Consolidated, compliance with Civil Code Section 3440 was required and was not met and that, therefore, the sale between Miller and Consolidated was null and void.

The reviewing Judge indicates, however, that the foregoing facts are of no consequence and that the rights of the parties are controlled by the language in Section 3014 of the California Civil Code, to wit:

"The security interest of the entruster may be derived from the trustee or from any other person,

and by pledge or by transfer of title or otherwise.”

The following analysis of the foregoing Code Section and the authorities cited by the District Court clearly demonstrate the error complained of by Appellant Trustee.

(a) Analysis of the Chichester Case.

In the discussion that follows the factual situation is as follows: Miller is the manufacturer-seller and Consolidated is the financed-purchaser as well as Trustee under the Trust Receipts executed with the Bank. The Bank financed the purchase of the scrapers by Consolidated from Miller *upon* delivery of the Trust Receipts naming the Bank as Entruster.

The District Court relied on *Chichester v. Commercial Credit Co.*, 37 C.A. 2d 439 (1940), to uphold its decision that the Bank has a valid security interest in the scrapers.

In the *Chichester* case Reagan was a retail automobile dealer selling Chrysler and Plymouth automobiles. Defendant, Commercial Credit Co., financed the purchase of automobiles placed on Reagan's floor, who, to obtain Plymouth cars, executed Trust Receipts and signed promissory notes in favor of Commercial Credit Co. The latter *then* ordered the automobiles *delivered to Reagan's place of business*. To obtain Chrysler cars, Reagan placed his order with the Chrysler Corporation in Detroit, Michigan. Commercial Credit Co., the Defendant, paid the purchase price to Chrysler and *then*

the automobiles were shipped to Reagan. The Bills of Lading were made out to and sent directly to Defendant. Reagan then signed Trust Receipts and promissory notes in favor of Defendant and Defendant then turned over the Bills of Lading to Reagan who took delivery of the automobiles. Defendant repossessed the automobiles just prior to Reagan filing his Petition in Bankruptcy. The facts of the *Chichester* case show clearly that the automobile dealer, Reagan, was a financed-purchaser as Consolidated was in our case. The Chrysler Motor Company was the manufacturer-seller as Miller was in our case. Here the similarity between the *Chichester* case and the pending appeal ends.

The following distinctions should be noted:

a) The bankrupt in the *Chichester* case was Reagan, the financed-purchaser. The bankrupt in the pending matter is Miller, the manufacturer-seller.

b) The financed-purchaser in the *Chichester* case obtained *actual possession* of the automobiles from the manufacturer-seller at his place of business, which was distinct and separate from the manufacturer-seller. The sale to the financed-purchaser from the manufacturer-seller was deemed to be a valid sale. In our case the Referee and the District Court have both found that Consolidated, the financed-purchaser, *did not obtain actual possession* of the scrapers and that the sale from Miller, the manufacturer-seller, to Consolidated, the financed-purchaser, was null and void for want of compliance with Section 3440 of the California Civil Code.

The Trustee in Bankruptcy in the *Chichester* case contended that title to the automobiles never vested in the defendant-financer and that the so-called "Trust Receipt" transaction between Reagan, *the financed-purchaser, and the financer was a chattel mortgage* which was void for failure to comply with the provisions of Civil Code Section 3440 relative to recordation. The Court pointed out in the *Chichester* case that in Trust Receipt transactions the Entruster does not have possession of the goods. Citing *Arena v. Bank of Italy*, 194 Cal. 195, the *Chichester* opinion points out (page 443):

"Prior to the adoption of the Uniform Trust Receipts Law, *the only instance where the security title of a trust receipts holder was permitted to prevail against the claims of creditors of the trustee, or against his trustee in bankruptcy*, was where the title of the entruster or trust receipt holder was derived from someone other than the trustee. Where the title of the entruster was derived from the trustee and not some third person, the transaction was treated as being similar to a chattel mortgage and was held to be void as against creditors of the trustee in the absence of recordation."

The Court said that the defendant-financer received its title directly from a third person; to wit, the Chrysler Corporation, and was, therefore, protected under the prior law as set forth in the *Arena* case, as well as under the present law embodied in the Civil Code Section 3014 (1) (b) (ii) which reads in part as follows:

"The *security interest* of the entruster may be derived from the trustee or from any other person . . ."

There was no evidence to prove that the financed-purchaser, at any time prior to signing the Trust Receipt, had either title to or possession of any of the automobiles in question. The Court then stated that it made no difference whether title of defendant originated with the Chrysler Corporation or with the financed-purchaser. On page 445 of the decision the Court states the nature of the title that an Entruster receives in a Trust Receipt transaction:

“Under the existing law, by which the instant case is to be governed, the entrusters *security interest* will be protected whether his title is derived from the trustee or from a third party.”

The *Chichester* case held, among other things, that it was not necessary for a Trust Receipt transaction *between the financed-purchaser and the financing company* to comply with Civil Code Section 3440, and that such Trust Receipt, though not complying with Section 3440, *would not be void as against the creditors of the financed-purchaser.*

b) The Chichester Decision Is Not Applicable to the Facts as They Exist in the Case at Bar.

Appellant Bankruptcy Trustee has no quarrel with the decision in the *Chichester* case as it applies to the particular facts of that case. However, it is respectfully submitted that the District Court has misunderstood and misapplied the *Chichester* case by attempting to apply the Decision as an abstract rule of law to an entirely different set of facts. It is respectfully submitted that Appellant Trustee in Bankruptcy is entitled to have the law applied to facts as they exist in

the pending matter on appeal and not to the facts as found in the *Chichester* case. It is important to note, as pointed out above, that it is Miller, the manufacturer-seller, that is the bankrupt in the case at bar and not Consolidated, the financed-purchaser, as in the *Chichester* case and, therefore, we are concerned here with the claims of the creditors of Miller, the manufacturer-seller, and not with the claims of the creditors of Consolidated, the financed-purchaser. Would the *Chichester* decision have been the same if the Chrysler Corporation had been the bankrupt, if Consolidated had done business on the same premises with the Chrysler Corporation and there had been *no valid sale or change of possession* as between Chrysler and Consolidated? Could the Bank of America then claim a security interest as against the Trustee in Bankruptcy for the Chrysler Corporation? This is exactly the factual situation in the case at bar.

The District Court mentions Civil Code Section 3014 (1) (b) (ii) which provides that the *security interest* of the entruster may be derived from the trustee or from any other person. This Code Section applies in a normal Trust Receipt transaction where there is a *valid sale* and an actual *change* of possession between the manufacturer-seller and the financed-purchaser. The Entruster can then receive his security interest either directly from the manufacturer-seller or from the financed-purchaser and, as pointed out in the *Chichester* case, it is not necessary that the financed-purchaser have either title or possession of the property prior to the execution of the Trust Receipts, nor

ould it be since ordinarily the execution of Trust Receipts is the method by which the financed-purchaser acquires possession of the property. However, *the validity of the security title* that the Entruster receives upon execution of the Trust Receipts is dependent upon *a valid sale* and an actual change of possession between the manufacturer-seller and the financed-purchaser. The Trust Receipt document has the effect of giving a security interest in the property of the financed-purchaser and not in the property of the manufacturer-seller. This is by virtue of the fact that the real parties to the Trust Receipt document are the Entruster, the financing company, and the Trustee, the financed-purchaser. Therefore, if no valid sale has ever been consummated between the manufacturer-seller and the financed-purchaser and the latter never obtains possession of the property subject to sale there exists no title in property of the financed-purchaser upon which the financing company can base any security interest. Granted, that once a valid sale has been made between the manufacturer-seller and the financed-purchaser and the financed-purchaser *obtains possession of the property* as Reagan, the bankrupt, did in the *Chichester* case, it would not then be necessary for the financed-purchaser and the financing company to comply with Section 3440 of the California Civil Code after compliance has already been made with the Trust Receipt sections of the Civil Code. So the holding of the District Court that the Entruster's security interest may be derivative from a Trustee or third party is admitted *but* the validity of the secu-

rity interest received is vulnerable and defective as between the creditors of a manufacturer-seller and the Entruster unless the *Entruster's security interest predicated upon a prior valid sale to, and the actual and continued change of possession by, the financed purchaser* being respectively Miller and Consolidated in the pending appeal. To the same general effect see *In re San Clemente Electric Supply* (D.C.-Cal.) 10 Fed. Sup. 252, and *Metropolitan Fin. Corp. v. Morf* 42 Cal. App. (2d) 756.

Two cases are cited in the *Chichester* decision, the *Arena* and *Boswell* Cases mentioned above. The facts of these cases were similar in that the Entruster derived its title from the Trustee *who had both possession and valid title* to the merchandise covered by the Trust Receipt. Thereafter, the Trustee became bankrupt and action was brought by the Entruster to reclaim the merchandise from the Trustee in Bankruptcy. The Entruster in the *Boswell* case was held entitled to claim the merchandise from the Trustee in Bankruptcy unlike the result in the *Arena* case. The decision was based on the Sections of the California Civil Code comprising the Uniform Trust Receipt Law stating that the Entruster could obtain his security interest from anyone. It is to be noted in the *Boswell*, *Arena* and *Chichester* cases that it was the financed-purchaser that became bankrupt and the issue was between *the creditors of the financed-purchaser acting through his Trustee in Bankruptcy and the Entruster*. It is to be noted also that in the *Boswell*, *Chichester* and *Arena* cases the financed-purchaser had

possession of the property in each case. It is submitted that the crux of the matter is brought out in the *Whichester* opinion (page 443) where the Court notes the effect of the *Arena* case as follows:

“Where the title of the entruster was derived from the trustee and not from some third person, the transaction was treated as being similar to a chattel mortgage and was held to be void as against creditors of the trustee in the absence of recordation.”

The *Arena* case, decided in 1924, thus held that the transaction was void as against creditors of the trustee, the financed-purchaser. The Uniform Trust Receipt Law, thereafter enacted in California, changed this result by permitting the Entruster to receive his title from anyone. Therefore, the security interest of the Entruster, no matter from whom received, now is valid as against *creditors of the trustee or financed-purchaser*. There is no logical reason for reading into this section that it was intended to make the receipt of such title by the Entruster good and valid security interest as against the creditors of the manufacturer-seller and also the financed-purchaser where a valid sale and the requisite change of possession was never consummated initially between the manufacturer-seller and the financed-purchaser. It is submitted that the *Whichester* decision is limited to the facts as set forth in that case and that the security interest of the Entruster is valid under those facts only as against the creditors of the financed-purchaser. The decision should not be extended, nor does it indicate, that the

security interest of the Entruster is valid as against the creditors of the manufacturer-seller.

Civil Code Section 3014 (3) which reads in part as follows *required Consolidated to have possession* of the scrapers:

“A transaction shall not be deemed a trust receipt transaction unless the *possession* of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

(a) In the case of goods, documents or instruments for the purpose of selling or exchanging them, or of procuring their sale or exchange;”

The importance of the necessity of possession by Consolidated, the financed-purchaser, in a Trust Receipt transaction is again brought out in *Moore v. Bank of America National Trust & Savings Association* (9 CA) 96 Fed. 2d 239 at page 241 where this court said:

“The essential character of the ‘trust receipts’ has long been understood by the Mercantile and Banking community. Such ‘trust receipts’ include the long-established method of securing mercantile loans by a transaction in which the lender, having no prior title in the goods, upon which the lien is to be given, and without having possession, *which remains in the borrower*, lends his money to the borrower upon the security of the goods, which the borrower is privileged to sell to clear the lien, he agreeing to pay all or part of the proceeds of the sale to the lender. The documents in which the transactions are expressed are known in the business of banking world as ‘trust receipts’.” (Emphasis added.)

in 13 California Law Review at pages 333 and 334 it said:

“A trust receipt is a valid form of security, however, when used in the proper situation. The buyer arranges for a banker or other lender to pay the seller, the lender taking title. The documents of title are sent forward to the lender. *It then becomes necessary for the buyer to have the goods in his business* so they, or the documents that represent them, *are turned over to him* against a trust receipt which declares that the title remains in the lender until payment, *that the buyer takes possession as trustee for the lender*, usually for purposes of sale or manufacture.” (Emphasis added.)

CONCLUSION.

Upon the foregoing argument and authorities, Appellant respectfully submits that the Bank of America cannot claim a valid security interest in the scrap-iron as against the creditors of Miller. Consolidated having been found to have no title or interest in the property, the security interest it purported to transfer to the Bank must likewise fall and that portion of the order of the District Court adverse to Appellant should be reversed.

Dated, June 5, 1957.

Respectfully submitted,
 JAMES M. CONNERS,
 LERRIGO, THUESEN, THOMPSON
 & THOMPSON,
Attorneys for Appellant.

THEORY OF THE EARTH AND ITS HISTORY

CHAPTER I

THE EARTH AND ITS HISTORY

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No. 15456

United States
Court of Appeals
for the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate of Miller
Scraper & Mfg. Co., Inc., bankrupt,
Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLI-
DATED DISTRIBUTORS, INC., a corpora-
tion, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Northern Division

FILED

MAY - 8 1957

PAUL P. O'BRIEN, CLERK

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for the Ninth Circuit

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California.

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Oakland, California,

DAVIS, GUERARD & BARRETT,
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Fresno, California. [1]*

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States for the
Southern District of California

In Bankruptcy. No. 8097

In the Matter Of
MILLER SCRAPER & MFG. CO., INC.,
Bankrupt.

DEBTOR'S PETITION

To the Honorable Judge of the District Court of
the United States for the Southern District of
California:

The Petition of Miller Scrapper & Mfg. Co., Inc.,
residing at corner Manning Ave. and Highway 99
between Fowler and Selma, County of Fresno, State
of California, engaged in the business of manu-
facturing farm implements,

Respectfully Represents:

1. Your petitioner has had its principal place of
business at corner of Manning Ave. and Highway
99, between Fowler and Selma, California, within
the above judicial district, for a longer portion of
the six months immediately preceding the filing of
this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to
surrender all its property for the benefit of its
creditors, except such as is exempt by law, and
desires to obtain the benefit of the Act of Congress
relating to bankruptcy.

3. The schedule hereto annexed, marked Sched-
ule A, and verified by your petitioner's oath, con-

tains a full and true statement of all its debts, and, as far as it is possible to ascertain, the names and places of residence of its creditors, and such further statement concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

Wherefore Your Petitioner Prays, that it may be adjudged by the court to be a bankrupt within the purview of said Act.

[Seal] MILLER SCRAPER & MFG. CO.,
INC.,

/s/ By CHARLES R. MILLER,
Vice-President,
Petitioner.

/s/ HAROLD M. CHILD,
Attorney for Petitioner,

United States of America,
Southern District of California,
County of Fresno—ss.

Oath for Corporation

I, Charles R. Miller, do hereby make solemn oath that I am the Vice-President of the corporation which is the Petitioning Debtor mentioned in the foregoing petition and which corporation is duly

organized under the laws of the State of California and engaged in the business of manufacturing farm implements and is not a municipal railroad, insurance nor banking corporation, and that I am duly authorized in the premises; that a copy of the vote or resolution authorizing the filing of this petition is attached hereto, made part hereof and marked Exhibit "C", and I do hereby make solemn oath that the statements contained in the above petition are true according to the best of my knowledge, information and belief.

/s/ CHARLES R. MILLER,
Officer of Corporation.

Subscribed and sworn to before me this 2nd day of August, A.D. 1954.

[Seal] /s/ ELEANOR BERGSTEDT,
Notary Public. [2]

[Endorsed]: Filed August 2, 1954.

United States District Court for the Southern
District of California

ORDERS OF ADJUDICATION AND
OF GENERAL REFERENCE

At Los Angeles, in said District, on August 4, 1954.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress

relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings herein-after mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 8097. Title of Proceedings: Miller Scraper & Mfg. Co., Inc. Filed: August 2, 1954. Referee: Wm. A. McGugin, Esq., Fresno, Calif.

LEON R. YANKWICH,
United States District Judge. [24]

[Endorsed]: Filed August 4, 1954.

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND

At Fresno, in said district, on the 11th day of August, 1954.

The above named Miller Scraper Co., a corporation, having been duly adjudged a bankrupt on a petition filed by it on the 2nd day of August, 1954;

and Joseph L. Joy, of Fresno, in said district, having been duly appointed receiver of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., Five Hundred (\$500.00) Dollars;

It Is Ordered that the said bond be, and it hereby is, approved.

WILLIAM A. McGUGIN,
Referee in Bankruptcy.

This is to certify that this is a true and correct copy of the original thereof on file in the office of the undersigned Referee in Bankruptcy.

Dated: June 2, 1955.

WILLIAM A. McGUGIN,
Referee in Bankruptcy. [25]

[Title of District Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE
TO SHOW NATURE, EXTENT AND VA-
LIDITY OF ALLEGED LIEN

To the Hon. William A. McGugin, Referee in Bankruptcy:

The petition of Joseph L. Joy respectfully represents:

1. That he is the duly appointed, qualified and acting Receiver in Bankruptcy of the above-named bankrupt estate.

2. That he has taken into his possession assets, property and effects of said estate including the following Miller Scrapers: Serial Numbers C-357 through C-376; Serial Numbers D-0130 through D-0134; Serial Numbers A-63 through A-77; Serial Numbers B-81 and B-82.

3. That upon said property a creditor herein, Consolidated Distributors, Inc. and Bank of America National Trust & Savings Association claims to be the owner of or claims to have an interest in and claims to have certain liens, claims or securities to secure certain obligations owing to it by the bankrupt. That it is necessary that a determination be had herein of the nature, extent, amount and validity, if any, of said claim of said creditor upon the assets of the bankrupt which have been taken into the possession of your petitioner.

Wherefore, your petitioner prays that an order to show cause be issued requiring said Consolidated Distributors, Inc. and Bank of America National Trust & Savings Association [26] to be and appear before the Honorable Referee on a day fixed, then and there to show and establish the nature, amount, extent and validity of its claim against the bankrupt herein and the nature, extent, amount and validity of any lien, claim or security upon any of the assets of said bankrupt.

/s/ JOSEPH L. JOY,

Receiver. [27]

Duly Verified.

[Endorsed]: Filed August 18, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the reading and filing of the verified petition of the Trustee herein, and good cause appearing therefor; and the Court being fully advised in the premises; on motion of said Trustee,

It Is Ordered that the prayer of the petition of the Trustee for issuance of an order to show cause herein is hereby granted and Consolidated Distributors, Inc. and Bank of America National Trust & Savings Association are ordered to be and appear before the Hon. William A. McGugin, Referee in Bankruptcy, in his courtroom, 510 Security Bank Building, 1060 Fulton Street, Fresno, California, on the 16th day of September, 1954, at 11:00 o'clock a.m. thereof, then and there to show and establish the nature, amount, extent and validity of its claim against the bankrupt herein and the nature, extent, amount and validity of any lien, claim or security upon the assets of said bankrupt.

It Is Further Ordered that a certified copy of this order to show cause and a copy of the annexed petition of the Trustee herein be served upon Consolidated Distributors, Inc. and Bank of America National Trust & Savings Association, at least ten (10) days prior to the date fixed herein for showing cause.

Dated: This 24th day of August, 1954.

/s/ WILLIAM A. MCGUGIN,

Referee in Bankruptcy. [28]

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

ORDER APPROVING TRUSTEE'S BOND

At Fresno, in said district, on the 4th day of October, 1954.

The above named Miller Scraper & Mfg. Co., Inc., having been duly adjudged a bankrupt on a petition filed by it on the 4th day of August, 1954; and Joseph L. Joy, of Fresno, in said district, having been duly appointed trustee of the estate of said bankrupt, and having duly qualified by giving a bond with sufficient sureties for the faithful performance of his official duties in the amount fixed by the order of this court, viz., Twenty Thousand (\$20,000.00) Dollars;

It Is Ordered that the said bond be, and it hereby is, approved.

WILLIAM A. McGUGIN,
Referee in Bankruptcy.

This is to certify that this is a true and correct copy of the original thereof on file in the office of the undersigned Referee in Bankruptcy.

Dated: June 2, 1955.

WILLIAM L. McGUGIN,
Referee in Bankruptcy. [30]

[Title of District Court and Cause.]

ORDER DETERMINING NATURE, EXTENT
AND VALIDITY OF CLAIMS TO PER-
SONAL PROPERTY

The Order to Show Cause filed in the above matter against Consolidated Distributors, Inc., and Bank of America National Trust and Savings Association, came on regularly for hearing on the 16th day of September, 1954, at which time said order to show cause was heard in part and was thereupon continued for further hearing on October 14, 1954, at which time a further hearing was had and the matter was submitted to the Referee for decision. Joseph L. Joy, Trustee, and Eckhart A. Thompson, attorney for Trustee, appeared on behalf of the above bankrupt estate, Ray Barrett, attorney, appeared for Consolidated Distributors, Inc., and H. H. Bechtel, attorney, appeared for Bank of America NTSA. Evidence having been introduced at said hearings and the cause having been submitted for decision and good cause appearing therefor, the Referee hereby makes his findings of fact and conclusions of law as follows:

Findings of Fact

The Referee makes his finding of fact as follows: That at all times mentioned herein, the above bankrupt was engaged in the business of manufacturing scrapers and other farm equipment on premises located on the southeast corner of Manning Avenue and U. S. Highway 99 in the County

of Fresno. That said operation was conducted on a plot of ground about 4 acres in size; that on the northwest corner of said premises was located a large metal [31] building on which there was a sign on which the name Miller Scraper Company appeared in letters about three feet high, plainly visible from both Highway 99 and Manning Avenue, the entrance to said property being on Manning Avenue.

That on or about March 20, 1952, the above bankrupt entered into a written agreement with Consolidated Distributors, Inc., whereby said Consolidated Distributors, Inc., was to act as the distributor for the scrapers to be manufactured by the above bankrupt. That pursuant to said agreement and an amendment thereto, said Consolidated Distributors, Inc., rented office space in a small office building located east and slightly south of the aforesaid large metal building. That on the entrance to said office building in letters two or three inches high, was printed the name Miller Scraper Manufacturing Co. and Consolidated Distributors, Inc. That inside said office building on the door leading to the office of Consolidated Distributors, Inc., was painted the name Consolidated Distributors, Inc., in letters two or three inches high. That after March of 1952 when the above bankrupt was manufacturing scrapers, these scrapers, as soon as they were manufactured, were moved out and parked on vacant ground south of a paint shed which paint shed was south of the aforesaid office on a portion of ground located at about the middle of the said

4 acre plot of ground owned by the above bankrupt; said scrapers bore the name Miller Scraper Manufacturing Co., and the above bankrupt at all times stored other farm equipment manufactured by and belonging to the bankrupt on the vacant land adjacent to said scrapers and on each side of said scrapers.

That immediately to the west of the land on which said scrapers were stored, there was stored certain steel raw materials around which steel there was placed a fence on which fence there was a sign stating that this steel was the property of C. O. Brose. [32]

That Consolidated Distributors, Inc., purchased said scrapers from Miller Scraper Manufacturing Co., and received invoices from the above bankrupt on the first and fifteenth of each month, which invoices would indicate the number of scrapers sold during the preceding fifteen days, together with the price of each of said scrapers. Upon receipt of these invoices, Consolidated Distributors, Inc., would take the invoices to the Bank of America NTSA and would receive therefor 90% of the amount of the invoice in exchange for a trust receipt issued to the Bank of America by Consolidated Distributors, Inc. The bank account of the above bankrupt was upon issuance of the trust receipt, credited by the Bank of America with the amount of 90% of the amount of said invoices.

That as weeds would grow up about the said scrapers parked on the above bankrupt's premises, the above bankrupt's employees would take a truck

and pull the scrapers from place to place so that the weeds could be cleared off from the area on which said scrapers were stored. From time to time, when said scrapers would require repairs occasioned by rust or faulty workmanship, the above bankrupt would take such scrapers back into the shop and repair said scrapers and then return them to the ground on which they were originally stored. This repair and/or reconditioning work was done without charge to Consolidated Distributors, Inc.

That in June of 1953, Consolidated Distributors, Inc. left the premises of Miller Scraper Co., removing their office therefrom and taking the name Consolidated Distributors, Inc., off of the door to the office and leaving the scrapers in question described in the attached Exhibit A, parked on the premises of Miller Scraper Co., as before. That during the interim from June to December, 1953, Consolidated Distributors, Inc., conducted business from Hammer Field in Fresno County. That on December 23, 1953, Consolidated Distributors, Inc., and Miller Scraper Co., the above bankrupt, entered into a written agreement which purported [33] to compromise and settle and supercede all previous agreements. That said agreement provided in part that all of the scrapers which are the subject of this proceeding and which allegedly belonged to Consolidated Distributors, Inc., should be sold by the above bankrupt in the name of Miller Scraper and Manufacturing Co., Inc.; that said bankrupt should, at its own expense place all of said scrapers in condition to be sold and should

sell them in a certain prescribed manner. Said agreement also provided for a division of the profits between Consolidated Distributors, Inc., and the above bankrupt with respect to said sales. Said agreement also provided that all adjustments to be made (repairs, etc.,) with the purchaser of said scrapers should be handled by the above bankrupt.

The Referee further finds that Jess Forrest, the manager of the Bank of America NTSA, Selma Branch, made monthly inspections of the scrapers in question from 1952 to December of 1954 and saw that said scrapers were intermingled with other equipment of the above bankrupt and located on the premises of the above bankrupt.

The Referee further finds that no signs were placed on or about the scrapers indicating that Consolidated Distributors, Inc., had any interest in said scrapers and that there was no way anyone could tell by looking at the premises or the scrapers that they were not the property of the above bankrupt, and finds that a truck with the name Miller Scraper Co. painted on it was occasionally parked in the vicinity of said scrapers.

That the above bankrupt estate has creditors who came into existence prior to March 20, 1952 and has creditors who came into existence subsequent to March 20, 1952 and prior to the adjudication of the above bankrupt.

Conclusions of Law

From the above facts, the Court makes its [34] Conclusions of Law, as follows:

That there was no immediate or continued change of possession of said scrapers from the above bankrupt to Consolidated Distributors, Inc., or any other person, firm or corporation, as required by Section 3440 of the Civil Code of the State of California, and that since the Bank of America NTSA was aware at all times of the facts concerning said lack of change of possession, said Bank of America NTSA is estopped from claiming any better title than was obtained by Consolidated Distributors, Inc.; and that by reason of said lack of change of possession, said purported sale from the above bankrupt to Consolidated Distributors, Inc., was and is, void. It is therefore

Ordered, Adjudged and Decreed that neither Consolidated Distributors, Inc., or Bank of America NTSA have any right, title or interest in and to the aforesaid scrapers, which scrapers are described in the attached Exhibit A.

Dated at Fresno, California this 4th day of April, 1955.

/s/ WILLIAM A. McGUGIN,
Referee in Bankruptcy. [35]

EXHIBIT A

Rotary scrapers as follows:

- # C 357-358-359-360-361-362-363-364-365-366—3 yd.
- # D 0130-0131-0132-0133-0134—4½ yd.
- # A 63-64-65-66-67-68-69—2 yd.
- # C 367-368-369-370-371-372-373-374-375-376—3 yd.
- # B 81 and B 82—6½ yd.

A 70-71-72-73-74-75-76-77—2 yd. [36]

Affidavit of Service by Mail attached. [37]

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

PETITION OF CONSOLIDATED DISTRIBUTORS, INC. FOR REVIEW

To the Honorable William A. McGugin, Referee in Bankruptcy:

The Petition of Consolidated Distributors, Inc., a corporation, respectfully shows:

I.

Your petitioner is aggrieved by the Order herein of William A. McGugin, Referee in Bankruptcy, dated April 4, 1955, a copy of which order is annexed hereto, marked Exhibit "A" and by reference thereto made a part hereof for all purposes.

II.

That the said Order hereinabove referred to was entered by the said Referee at the conclusion of the taking of testimony and documentary evidence upon the issues of law and fact; that the facts of the matter are admitted and undisputed; and that the Findings of Fact set forth in the said Order dated April 4, 1955 are erroneous and incomplete, and that the following is a complete statement of the facts upon the record of these proceedings, to wit: [38]

That Miller Scraper Manufacturing Co., Inc., a California corporation, is successor to Kenneth L.

Miller, an individual doing business as Miller Scraper Co., both of said business entities being hereafter referred to as "Miller"; that at all times material hereto, and prior to December, 1953, Miller was engaged in the business of manufacturing dirt moving scrapers, and certain farm equipment; that Miller's manufacturing plant was situated upon the northwest corner of a certain tract of approximately four (4) acres in size situated at the southeast corner of the intersection of Manning Avenue and U. S. Highway 99 in the County of Fresno, California; that approximately 300 feet eastward of Miller Manufacturing plant, and at a point approximately 75 feet south of the south edge of Manning Avenue, there was situated an office building; that approximately equidistant between the Miller manufacturing plant and the said office building, and situated approximately 75 feet in a southerly direction, was a paint shed wherein manufactured articles were given a final coat of finishing paint; and

That Miller Scraper Manufacturing Co., Inc. is now a bankrupt; that by written agreement dated March 20, 1952, as amended by a further written agreement dated April 4, 1952, the said bankrupt corporation agreed, in writing, with petitioner herein that your petitioner, Consolidated Distributors, Inc., would purchase as sole distributor thereof all of the output and production of Miller's scrapers; and paragraph 3 of said written agreement provides that

"The Distributor agrees to purchase from the

Manufacturer all of the output or production of said Manufacturer and agrees to accept all production upon completion at the yard of the manufacturing plant of the Manufacturer;”

and,

That the said written Agreement further provides that

“The Manufacturer and Distributor agree that [39] all manufactured items are to be delivered to the Distributor F.O.B. carrier, at Selma, California, or are to be stored and/or warehoused at the yard of the manufacturer at the discretion of the Distributor, and that in either event, title thereof shall pass to the Distributor upon the occurrence thereof”,

and

That the said written agreement further provides that

“and the Distributor herein agrees to pay the Manufacturer in full for all items so delivered and appropriated by the Manufacturer on the 1st and 15th of each and every month after the date of the Manufacturer’s compliance therewith;”

and

That the above mentioned written agreement, and the amendment thereto, were recorded in Volume 3170 of Official Records of Fresno County at pages 62 and 73, respectively; and

That by the terms of said written agreement above mentioned, as amended, Miller Scraper Manufacturing Co., Inc., contracted to sell and deliver

all of their production of scrapers to Consolidated Distributors, Inc., and agreed to, and did, designate a portion of the premises as a storage area for the scrapers to be so sold and delivered under the said agreement; and

That the types, descriptions and weights of the various kinds of scrapers produced by Miller Scraper were as follows: Model A, 2 yard capacity, 4270 lbs. gross weight—Model B, 6½ yard capacity, 13,210 gross weight—Model C, 3 yard capacity, 6940 lbs. gross weight—Model D, 4½ yard capacity, 8700 lbs. gross weight—10 yard scraper, made under special order, 18,750 lbs. gross weight; that the width of the Model A scraper is 6'11", the width of the Model B is 10'6", the width of the Model C is 7'10", the width of the Model D is 7'11", and the width of the Model E is 10'10"; that the height of the Model A is 4'9", that the height of the Model B is 6'10", that the height of the Model C is 5', that the height of the Model D is 6'6", and that the height of the [40] Model E is 8'; that all of the said scraper models are bulky and difficult to move by ordinary motive equipment, excepting for the Model A which can be moved by an ordinary four-wheel drive vehicle; and

That from March, 1952 to July 1953, your petitioner occupied offices in the office building hereinabove mentioned; that your petitioner occupied equal space in said office building with Miller Scraper Company; that Miller's factory is an isolated building, identified with bankrupt's name in letters approximately 3 feet high, plainly identify-

ing the building as its manufacturing plant; that the office building was plainly identified by a sign on the exterior thereof, facing Manning Avenue, whereon the names of Miller Scraper Manufacturing Co., Inc. and Consolidated Distributors, Inc. were displayed with equal prominence, plainly identifying the said building as housing the offices of the respective companies; that within the said building, and opening out of a common entrance way, the offices of the respective companies were identified by distinctive lettering on their respective office doors; that at all times the two corporations were separately conducted business enterprises, with separate mail box addresses, separate office personnel, separate officers and directors, separate office signs, separate and distinctive letterheads, separate telephone numbers, and distinctly separate business premises; that petitioner paid Miller cash rentals for the separate offices so occupied by your petitioner; and

That beginning on or about April 1, 1952, petitioner began accepting deliveries of the scraper products of Miller Scraper Company; that, as each scraper was pulled out of the paint shed, where it had been painted as the last step in its manufacture, Miller personnel unhooked from it upon a storage lot of approximately one acre in size situated at the extreme eastern side of the premises and near the extreme southern edge of the premises; [41] that as each scraper came out of the paint shed it was pulled therefrom by a tractor owned and operated by Miller and parked on the

parking and storage area in one or more rows; that as the scrapers were parked in the said storage area each scraper was immediately inspected by Consolidated employees, who either accepted or rejected it depending upon whether any mechanical defects were discovered, and if any scraper was rejected the Miller employees immediately hooked onto it and pulled it back into the manufacturing plant where the defect was corrected; that, if the scraper was accepted by Consolidated employees, a Consolidated employee immediately enumerated and listed it upon a trust receipt, in statutory form; that invoices, in the nature of bills of sale, were received by your petitioner from Miller on or about the 1st and 15th day of each month, upon which were listed and itemized the scrapers produced and delivered by Miller during the preceding fifteen day period; that, as soon as the said invoices were received, they were attached to the corresponding trust receipts by your petitioner, and were taken by your petitioner to the Bank of America, Selma Branch; that immediately upon delivery of the said trust receipts to the Bank, the Miller Scraper Company account at the said Bank was credited with a sum equal to 90% of the invoice price of each scraper listed upon the said trust receipts; that at the present time the said Bank of America has paid the said bankrupt for scrapers described in the trust receipts, and remaining in the hands of the bankrupt estate, a total of Thirty Nine Thousand Four Hundred Ninety Six and 00/100 Dollars (\$39,496.00); that Miller

Scraper Co. received the entire sum of Thirty Nine Thousand Four Hundred Ninety Six and 00/100 Dollars (\$39,496.00), in cash, and received the entire use and benefit thereof; and

That, with further reference to the scrapers parked in the Consolidated storage area, Miller Scraper Company personnel [42] exercised no dominion or control over the said scrapers from the time the scrapers were individually inspected and accepted by your petitioner; that, upon a very few occasions, Miller was called upon to inflate tires, remove rust, and perform other minor services of a similar nature under its warranty of quality and workmanship; that Miller's name appeared upon said scrapers only as a manufacturer's trade mark thereon; that the storage area was leveled and flattened to provide a distinctive area for the storage of said scrapers; that it was the duty of Miller Scraper Company to keep weeds down within the storage area, and at infrequent intervals Miller personnel, operating a tractor, would move the scrapers about within the storage area so that weeds could be scraped down and eliminated; that your petitioner contracted for the sale of all of said scrapers through retail dealers, none of whom had any contractual relationship with Miller; that as scrapers were sold and delivered at retail, or moved out of the storage area for demonstration purposes, the scrapers were moved by Consolidated personnel or by special equipment for hauling and transporting the said scrapers hired and paid for by Consolidated Distributors, Inc.; that the neces-

sary permits from county and state authorities to move the heavy scrapers on or across county and state highways were in every case obtained by petitioner and not by Miller; that the said scrapers were insured by your petitioner against loss and hazards on the parking area and in transit shipment by your petitioner, and not by Miller Scraper Company; and

That a four-wheel drive jeep, bearing the name of Consolidated Distributors, Inc. in letters six inches high prominently displayed on each side of said jeep, was used for the purpose of pulling the smallest scraper from the loose sandy soil of the parking area, and for demonstrating the utility of the small scraper, and the said jeep was always parked in or near the [43] said scrapers in the storage area; that a pickup truck with the name Miller Scraper Company painted on its side was owned by Miller but was not identified in any way with the scrapers in the storage area; and

That in June of 1953 your petitioner moved out of its offices, but at all times between June and December maintained personnel there whose duties included inspection and receipt of scrapers; that all scrapers produced by Miller for its own account, after December, 1953 were parked upon a triangular piece of ground in front of its factory bounded by Manning Avenue and the railroad right-of-way, which was an area distinct from the parking area of Consolidated Distributors, Inc.; and

That Jess Forrest, Manager of the Bank of

America, Selma Branch, made monthly inspection of the scrapers parked on the storage lot from March, 1952 to September, 1954, and checked the serial numbers of said scrapers against the serial numbers appearing on the trust receipts, finding no discrepancies therein; and the said Jess Forrest found that there was no property other than property belonging to Consolidated Distributors, Inc. parked within the said storage area at any time during the said inspections;

III.

The Referee's Conclusions of Law are erroneous and should read as follows:

1. That the machinery and equipment, to wit, the scrapers involved in the within proceedings, were articles of such size, weight and dimension, and so numerous, that they were not readily transferable by manual delivery; and that as a matter of law the actual physical delivery of the said scrapers to Consolidated Distributors, Inc., and the storage by that company of the said scrapers in the particular storage area set apart exclusively for their storage, constitutes sufficient delivery and immediate and continued change of possession of the said scrapers from the [44] above bankrupt to Consolidated Distributors, Inc. to comply with the law applicable under the circumstances.

2. That in the instant case Consolidated Distributors, Inc., and the Bank of America, N. T. & S. A., complied with all of the applicable requirements of California law pertaining to transactions in-

volved in trust receipts method of mercantile financing.

3. That the bankrupt, Miller Scraper Co., Inc., did in fact receive the sum of Thirty Nine Thousand Four Hundred Ninety Six and 00/100 Dollars (\$39,496.00) from Consolidated Distributors, Inc., which said sum was advanced and loaned by the Bank of America, N. T. & S. A. to Consolidated Distributors, Inc. in accordance with the agreement between the parties providing for the instant method of trust receipts financing.

4. That Consolidated Distributors, Inc. actually paid to the bankrupt the sum of Thirty Nine Thousand Four Hundred Ninety Six and 00/100 Dollars (\$39,496.00) as purchase price of the scrapers in inventory and unsold on the date of adjudication in bankruptcy of Miller Scraper Company, and therefore acquired valid title to the said scrapers; that your petitioner was therefore entitled by right to create, and did create, in the Bank of America, N. T. & S. A. a security interest in and to the said scrapers pursuant to the written agreement providing for the trust receipts financing method; and that, therefore, as against all parties in interest in these proceedings, including, among others, the creditors of the bankrupt and the trustee of Miller Scraper Company, the security interest of the Bank of America, N. T. & S. A. in and to the said scrapers is a valid preexisting lien as security for the repayment of the aforesaid sum of Thirty Nine Thousand Four Hundred Ninety Six and 00/100 Dollars (\$39,496.00).

5. That this court should enter its order in these premises adjudging that Miller Scraper & Manufacturing Co., Inc., bankrupt [45] herein, has no right, title, estate, lien or interest in and to the aforesaid scrapers, as the same are identified and enumerated in the Referee's Order dated April 4, 1955 on file in these proceedings.

Wherefore, petitioner prays that proceedings be had upon this petition according to law and the practice of this court; that this court make and enter its order adjudging that Miller Scraper & Manufacturing Co., Inc., bankrupt herein, has no right, title, estate, lien or interest in and to any or all of the certain scrapers identified and enumerated in the Referee's Order dated April 4, 1955 on file herein; for its costs, and for such other and further relief as may be just and proper.

Respectfully submitted,

CONSOLIDATED DISTRIBUTORS,
INC.,

/s/ By CHARLES RAY BARRETT,
Petitioner.

DAVIS, GUERARD & BARRETT,

/s/ By CHARLES RAY BARRETT,
Attorneys for Petitioner. [46]

Duly Verified. [47]

[Exhibit A. Order is set out at pages 11-17 of this printed record.]

Acknowledgment of Service attached.

[Endorsed]: Filed May 5, 1955.

[Title of District Court and Cause.]

NOTICE OF FILING CERTIFICATE
ON REVIEW

Notice Is Hereby Given that the Certificate and Report of Referee William A. McGugin on the petitions of Bank of America National Trust & Savings Association and Consolidated Distributors, Inc. to review the Order of the Referee Determining the Nature, Extent and Validity of Interest in and Title to Personal Property, was filed with the Clerk of the above entitled Court on the 2nd day of June, 1955 by mail, and will be set for hearing.

Dated: June 2, 1955.

/s/ WILLIAM A. MCGUGIN,
Referee in Bankruptcy. [54]

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

CERTIFICATE AND REPORT OF REFEREE
ON PETITIONS OF THE BANK OF
AMERICA NATIONAL TRUST & SAV-
INGS ASSOCIATION AND CONSOL-
IDATED DISTRIBUTORS, INC. TO RE-
VIEW REFEREE'S ORDER TO DETER-
MINE NATURE, EXTENT AND VALID-
ITY OF INTEREST IN AND TITLE TO
PERSONAL PROPERTY

To the Honorable Judges of the District Court of
the United States, Southern District of Cali-
fornia:

I, William A. McGugin, Referee in Bankruptcy,
in charge of the above entitled proceedings, in re-
sponse to the petitions of the Bank of America Na-
tional Trust & Savings Association and Consoli-
dated Distributors, Inc. to review the Referee's
Order that they had no right, title or interest in,
or claim to, or security in or lien on, certain per-
sonal property consisting of forty-two Rotary
Scrapers, made and filed by me on April 4, 1955,
do hereby certify that in the course of the pro-
ceedings in said cause before me that:

1. On August 2, 1954 the above named bankrupt
filed a voluntary petition in bankruptcy and was
adjudicated a bankrupt on that date and the matter
was referred to [55] William A. McGugin, Referee
in Bankruptcy, by general reference.

2. That on August 11, 1954, Joseph L. Joy duly qualified as receiver in this matter and upon said date he came into possession of all of the assets and property of the bankrupt, including the rotary scrapers involved in this review. That on October 4, 1954, Joseph L. Joy duly qualified as the trustee in this matter.

3. That the rotary scrapers were in the possession of the bankrupt at the time of the filing of the petition in bankruptcy.

4. That on August 20, 1954, the Bank of America and Consolidated Distributors, Inc., through their attorneys and the Receiver in Bankruptcy stipulated that said Bank and said Consolidated Distributors then and there show the nature, extent and validity of their alleged interests in said rotary scrapers; that a hearing was then held thereupon and was continued for further hearing to October 14, 1954, at which time was further heard and continued for further hearing to November 1, 1954, at which time the matter was submitted upon argument of counsel.

The question presented by said petitioners for the Court to determine is as follows:

1. Was there sufficient delivery and transfer of possession of said scrapers to said respondents to satisfy the requirements of Section 3440 of the Civil Code of the State of California?

Upon consideration of the evidence I made the findings of fact and conclusions of law forwarded herewith.

I hereby certify to the District Court the following documents: [56]

1. Voluntary petition in bankruptcy filed August 2, 1954 (by reference to Clerk's Original on file in the Clerk's Office of the United States District Court for this District).

2. Order of Adjudication in Bankruptcy (by reference to Clerk's Original on file in the Clerk's Office of the United States District Court for this District).

3. Certified copy of Order Approving Trustee's Bond, and of Order Approving Receiver's Bond.

4. Petition for Order to Show Cause to Show Nature, Extent and Validity of Alleged Lien.

5. Order to Show Cause issued August 24, 1954.

6. Order Determining Nature, Extent and Validity of Claims to Personal Property.

7. Petition for Extension of Time within Which to File Petition for Review.

8. Order Extending Time for Filing Petition for Review to April 25, 1955.

9. Order Extending Time for Filing Petition for Review to May 5, 1955.

10. Petition for Review of Bank of America.

11. Petition for Review of Consolidated Distributors, Inc.

12. This Certificate.

13. Transcript of Testimony.

14. Exhibits A to H of Bank of America.
15. Exhibits A to F of Consolidated Distributors.
16. Exhibits 1 to 9 of Trustee.

Respectfully submitted,

/s/ WILLIAM A. McGUGIN,
Referee in Bankruptcy. [57]

Affidavit of Service by Mail attached. [58]

[Endorsed]: Filed June 3, 1955.

United States District Court, Southern District
of California, Northern Division

No. 8097 In Bankruptcy

In the Matter of
MILLER SCRAPER & MFG. CO., INC.,
Bankrupt.

ORDER ON PETITIONS FOR REVIEW OF REFeree'S ORDER

The petitions for review of the order of the Referee dated April 4, 1955, denying the right, title and interest of the Bank of America and Consolidated Distributors, Inc., to certain property described in said petitions, were filed on April 25, 1955 and May 5, 1955.

Counsel for Consolidated Distributors are Davis, Guerard and Barrett, Charles Ray Barrett appearing, and H. H. Bechtel appeared for the Bank of America. The trustee was represented by Eckhart A. Thompson and James M. Conners.

The facts are uncontradicted, and in the main are set forth in the Referee's findings of fact.

The bankrupt was engaged in the business of manufacturing scrapers and other farm equipment on premises located on four acres of ground on U. S. Highway 99, south of the City of Fresno. On the plot of ground was located a large metal building with the Miller Scraper sign in letters about three feet high. [59]

By written agreement dated March 20, 1952, the predecessor of the bankrupt contracted with petitioner Consolidated Distributors, Inc., then designated as Industrial Equipment Company, Inc., whereby said last named corporation was to act as distributors of the scrapers manufactured by the bankrupt. This agreement was supplemented and amended by an agreement dated April 4, 1952. Pursuant to this agreement as amended, Consolidated rented office space in a small office building located near the building occupied by the bankrupt and on the same plot of ground. At the entrance to this office building a sign was placed which carried the name of Consolidated Distributors and of Miller Scraper Company, in letters two or three inches high. Inside the building another sign was placed on the door leading to the office of Consolidated which indicated that it was the office of Consolidated. Pursuant to the agreement as amended, about an acre of ground on the same plot was devoted to the storage of scrapers manufactured by the bankrupt and delivered to Consolidated Distributors. Equipment belonging to the bankrupt

was stored or kept adjacent to the storage area. Under the agreement as amended, Consolidated, on the first and fifteenth days of each month, was required to pay for all scrapers delivered to the storage lot and accepted by Consolidated during the preceding fifteen days. Invoices to such scrapers were directed to the Bank of America and delivered to Consolidated Distributors. Consolidated then attached to such invoices trust receipts which were delivered to the Bank of America. The Bank then credited the account of the bankrupt with an amount equal to 90% of the invoice price, and Consolidated Distributors paid the remaining ten per cent to the bankrupt. [60]

The scrapers in question were located on the plot of ground above described at the time of the filing of the petition in bankruptcy. All of the scrapers involved in this proceeding were placed under trust receipt financing, in the manner above indicated, prior to March 31, 1953. In June of 1953, Consolidated Distributors moved its offices from the premises, and removed its name from the office there. The scrapers then on the lot were left there and, thereafter, Consolidated conducted its business from offices at Hammer Field in Fresno County. In December, 1953, the parties entered into a written agreement which superceded all previous agreements and provided that all of the scrapers in question were to be sold by the bankrupt in the manner therein prescribed, and that the profits were to be divided as in said agreement provided.

Representatives of the Bank of America made

monthly inspections of the scrapers located on the plot of ground.

The Referee issued an order directed to the Consolidated Distributors, Inc., and to the Bank of America, to establish the nature and extent and validity of any lien, claim or security upon the assets of the bankrupt. A hearing was held and the order of the Referee was made. As a conclusion of law from the findings of fact, the Referee found:

“That there was no immediate or continued change of possession of said scrapers from the above bankrupt to Consolidated Distributors, Inc., or any other person, firm or corporation, as required by Section 3440 of the Civil Code of the State of California, and that since the Bank of America NTSA was aware at all times of the facts concerning said lack of change of possession, said Bank of America NTSA is estopped from claiming any better title than was [61] obtained by Consolidated Distributors, Inc., and that by reason of said lack of change of possession, said purported sale from the above bankrupt to Consolidated Distributors, Inc., was and is, void.”

Two questions are presented by this review. The first question relates to the extent and validity of any interest or title of Consolidated in the scrapers. The Referee concluded that Consolidated had no right, title or interest because there had been no immediate or continued change of possession of the scrapers as required by Section 3440 of the Civil Code of the State of California. The Court has reviewed the findings made by the Referee and the

transcripts of the testimony taken by the Referee. The Court is in no position to state that the findings of fact and the conclusions of law of the Referee in this respect are erroneous. Reasonable minds might reasonably disagree on the conclusions to be drawn from all of the evidence before the Referee. This Court will therefore not disturb the findings of fact or the conclusions of the Referee insofar as they relate to any interest, right or title of Consolidated in and to the scrapers, and his findings and conclusions in that respect are affirmed.

The second question presented by the review involves the right, title and interest of the petitioner, Bank of America, under the trust receipts which cover all of the scrapers. As above indicated, all the invoices prepared by the bankrupt were made directly to the Bank of America. Trust receipts in proper form were attached to the invoices. The Bank promptly complied with all of the requirements of the Trust Receipts Act. The title and interest thus acquired by the Bank was not a derivative interest or title. Under the provisions of Section 3014 of the Civil Code of [62] California, the security interest of the entruster may be derived from the trustee or from any other person and by pledge or by transfer of title or otherwise. Compliance with the provisions of Section 3440 of the Civil Code of California was not required. Section 3016.16 states that "Notwithstanding the provisions of any general or special law, the provisions of this chapter shall control except as to trust receipts and pledge transactions entered into before this

chapter becomes effective." The Trust Receipts Act became effective in 1935. Shortly after the enactment of the Trust Receipts Act, Judge McCormick of this District, in an opinion in *In re Boswell*, 20 Fed. Supp. 748, said:

"Some chief differences [between the Trust Receipts Act and other security transactions] that readily enter the mind when the term is used include the absence of actual or immediate delivery or change of possession, the removal of notice, recordation or verification requirements, and the retention of title in the vendor."

In *Chichester v. Commercial Credit Corporation*, 37 C A 2d 439, the Court considered the Trust Receipts Act with other statutes, such as Section 3440, and said,

"This rule of construction has for its purpose the object of unifying the laws of the several states on the same subject and is therefore not to be treated as a codification of local laws of commercial customs. The fundamental purpose of the act in question should be considered in the light of the general commercial law of the country as a whole. The principle of the uniform act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it." (Citing: *Commercial National Bank v. Canal-Louisiana Bank and Trust Company*, 239 U. S. 520.) [63]

While the facts in the *Chichester* case are not entirely the same as the facts in the instant case,

the principles of law therein enunciated are extremely persuasive.

It is the view of the Court that the conclusion and order of the Referee that the Bank of America has no right, title or interest in and to the scrapers, or is estopped from claiming any better title than was obtained by Consolidated, are erroneous, and must be and are reversed.

This cause is remanded to the Referee with instructions to pursue such proceedings as may be appropriate in a manner consistent herewith.

The Clerk of this Court is directed to forthwith transmit copies of this order to all counsel and the Referee.

January 12, 1956.

/s/ GILBERT H. JERTBERG,
Judge, United States District Court.

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Joseph L. Joy, Trustee of the above-named bankrupt estate, Petitioner in the proceeding and cause herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Honorable Gilbert H. Jertberg, Judge of the above-entitled United States District Court, made and entered on the 12th day of January, 1956, and to that portion of said Order reversing the Order of the Referee

in Bankruptcy made and entered on the 4th day of April, 1955.

Dated: This 6th day of February, 1956.

ECKHART A. THOMPSON,
JAMES M. CONNERS,
/s/ By JAMES M. CONNERS,
Attorneys for Appellant. [65]

[Endorsed]: Filed February 7, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS

To the above-entitled Court and to John A. Childress, Clerk of said Court; and to Bank of America National Trust and Savings Association, a National Banking Association, and to H. H. Bechtel; and to Consolidated Distributors, Inc., a corporation, and to Davis, Guerard & Barrett, its attorneys: [66]

* * * * *

Statement of Points

The points upon which Appellant intends to rely on the appeal are:

(1) The District Court erred in failing to affirm Referee's Finding of Fact No. 4, relating to the purchase of scrapers by Consolidated Distributors, Inc. from the bankrupt and execution of Trust Receipts thereon, and Finding of Fact No. 7 relating to inspections of said scrapers by the Bank of America.

(2) The District Court erred in overruling the Conclusion of Law of the Referee that the Bank of America is estopped from claiming any better title than that obtained by Consolidated Distributors, Inc. [67]

(3) The District Court erred in its Finding and Conclusion that the title and interest of the Bank of America to said scrapers was not a derivative title or interest.

(4) The District Court erred in its conclusion and Order that the title and interest of the Bank of America is valid as against Appellant Trustee and the creditors of the bankrupt estate.

Dated: This .. day of July, 1956.

/s/ ECKHART A. THOMPSON,

/s/ JAMES M. CONNERS,

Attorneys for Appellant. [68]

Affidavit of Service by Mail attached. [69]

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby Certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 69, inclusive, containing the original:

Debtor's Petition;

Order of Adjudication and of General Reference;

Order Approving Trustee's Bond dated August 11, 1954;

Petition for Order to Show Cause to Show Nature, Extent and Validity of Alleged Lien;

Order to Show Cause;

Order Approving Trustee's Bond dated October 4, 1954;

Order Determining Nature, Extent and Validity of Claims to Personal Property;

Petition of Consolidated Distributors, Inc., for Review;

Notice of Filing Certification on Review;

Certificate and Report of Referee on Petitions, etc., to Review Referee's Order to Determine Nature, Extent and Validity of Interest in and Title to Personal Property;

Order on Petitions for Review of Referee's Order;

Notice of Appeal;

Designation of Contents of Record on Appeal and Statement of Points;

B. Two volumes of Reporter's Official Transcript of Proceedings had on October 14, 1954;

C. Exhibits A and B of Claimant Consolidated Distributors, Inc.;

Exhibit A of Bank of America;

Exhibit 9 of Trustee.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and the seal of said District Court, this 27th day of February, 1957.

[Seal] JOHN A. CHILDRESS,
 Clerk,
 /s/ By CHARLES E. JONES,
 Deputy.

In the United States District Court, Northern
District of California, Southern Division

In Bankruptcy No. 8097

In the Matter of
MILLER SCRAPER & MFG. CO.,
Bankrupt.

TRANSCRIPT OF PROCEEDINGS
Fresno, California
August 20, 1954

Before Hon. William A. McGugin, Referee in
Bankruptcy.

Hearing of an Order to Show Cause why Bank of America should not appear and show the nature and extent and validity of any interest or lien that it may have in or to any of the property of the bankrupt in the above matter.

Mr. H. H. Bechtel of San Francisco, California was present, representing the Bank of America, and Mr. Joseph L. Joy of Fresno, California, representing the Trustee of Miller Scrapper & Mfg. Co.

The above-entitled matter came on for hearing

on August 20, 1954, at the hour of 10:00 o'clock a.m. before William A. McGugin, Referee in Bankruptcy.

Whereupon, the following proceedings were had and testimony taken, to wit:

Mr. Joy: If the Court please, it might be stated that there has been no service on Consolidated Distributors. Can it be stipulated that any rights they may have in the matter will be reserved to them?

The Court: The rights of Consolidated Distributors will be automatically reserved to them anyway.

Mr. Bechtel: The Bank of America would also like to reserve the right to file an answer to the petition if necessary.

The Court: No doubt these matters are related. Consolidated Distributors have claimed certain interests in the scrapers involved and the Bank of America has financed certain scrapers on trust receipts. If no service has been made on Consolidated Distributors, the hearing may have to be continued until both parties are before the Court. The Court will hear whatever evidence both parties present to it at that time.

Mr. Bechtel: All right, your Honor.

Mr. Bechtel: I will call Mr. G. E. Minear of the Bank of America. [1]*

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

G. E. MINEAR

Called as a witness on behalf of Bank of America, being first duly sworn, testified as follows:

Mr. Bechtel: Mr. Minear, what is your full name?

Mr. Minear: G. E. Minear.

Q. By whom are you employed?

A. Bank of America.

Q. In what capacity?

A. Assistant cashier.

Q. As such, are you familiar with the financial transactions of the bank with the Miller Scraper Co.?

A. Yes.

Q. Is Miller Scraper Co. indebted to the Bank of America?

A. No.

Q. You heard the Petition and Order directed against the Consolidated Distributors, Inc. Have you had any financial transactions with that corporation?

A. Yes.

Q. What is their nature?

A. Trust receipt financing.

Q. I will show you a document entitled Trust Receipt, dated January 5, 1953, are you familiar with that document?

A. Yes.

Q. And by whom is that document held?

A. By the Bank of America, Selma branch.

Q. And by virtue of that document, did the bank finance the purchase of the property therein described?

A. Yes. [2]

Q. How was that transaction handled?

A. The bank is billed for these items from the Miller Scraper Co. Miller is paid direct by the bank

(Testimony of G. E. Minear.)

and the items are in turn placed on trust receipt flooring.

Q. Could you tell from that document how much the bank advanced? A. \$18,980.00.

Q. Has any part of the obligation been repaid?

A. Part of it.

Q. Is that indicated on the trust receipt?

A. Each item is stamped by date—others individually as to when they were paid.

Q. And that stamp indicates that the item opposite the stamped number has been released from the trust receipt? A. That is right.

Mr. Bechtel: I would like to offer these documents in evidence and ask that they be withdrawn later and photostatic copies substituted.

The Court: They can be withdrawn and photostatic copies substituted. You can arrange with our office to have photostatic copies made. We will keep the documents until they have been photostated.

Mr. Bechtel: May I suggest this, your Honor? To save a bit of expense, we have had photostats made of the face of the trust receipts.

The Court: None of the reverse side?

Mr. Bechtel: I believe that the trustee will agree that the [3] reverse side is the same on all of them.

The Court: This original document will be received in evidence as Exhibit A of the Bank of America.

[See pages 187-198]

Mr. Bechtel: I think, your Honor, it is going to be necessary to have them all photostated. We withdraw our request.

(Testimony of G. E. Minear.)

Mr. Bechtel: Mr. Joy, will you stipulate as well—I did not question the witness as to the document that is attached to the trust receipt which is offered in evidence, which is an invoice from the Miller Scraper Co. That it may be termed part of the exhibit?

Mr. Joy: I will so stipulate, yes.

The Court: It is so received.

Mr. Bechtel: Mr. Minear, I will show you likewise a document with the title Trust Receipt Flooring, dated March 31, 1953 and will ask you if that is likewise from the records of the Selma branch of the Bank of America? A. It is. Yes.

Q. And it sets forth the financial interest at the time of the Selma bank? A. Yes.

Q. Could you tell the Court how much was advanced to the Consolidated Distributors on account of this trust receipt? A. \$11,365.00.

Q. Does this trust receipt likewise indicate what payments were made thereon and property released therefrom? A. It does.

Q. I would like to offer this in evidence as Exhibit B.

The Court: It will be received in evidence as Exhibit B of the Bank of America. [4]

Mr. Bechtel: Trust receipt No. 29RF1837. That also includes the attached invoice.

The Court: It is so received.

Mr. Bechtel: Do you mind giving me the number on Exhibit A?

(Testimony of G. E. Minear.)

The Court: 5RF1740, with 76 in parentheses. That is true of each of the two exhibits.

Mr. Bechtel: I will show you another document likewise entitled Trust Receipt Flooring, dated March 2, 1953 bearing No. 1RF1798. I will ask if this is likewise indicative of financing under trust receipt of the property therein described?

Mr. Minear: It is.

Q. I asked previously as to the amount advanced. Is that the figure appearing in the lower part of the document? A. Yes.

Q. And it likewise indicates the property which has been released from the receipt?

A. Yes, it does.

Q. Attached to the trust receipt and to the previous trust receipts offered in evidence there is what appears to be a statement or invoice. These documents attached to those receipts and to this one, are they part of the same transaction?

A. Yes.

Mr. Bechtel: I will offer that in evidence.

The Court: It will be received in evidence as Exhibit C of the Bank of America.

Mr. Bechtel: I will show you a similar document dated February [5] 2, 1953 bearing No. 2RF1762. I will ask you whether the questions asked relative to the previous similar documents are likewise true of this document?

A. Yes, they are.

Q. Insofar as the amount advanced and the property released? A. Yes.

(Testimony of G. E. Minear.)

Q. That is also true of the documents attached?

A. Yes.

Mr. Bechtel: I would like to offer these documents in evidence.

The Court: They will be received as Bank of America's Exhibit D.

Mr. Bechtel: I will show you a final document of similar nature and which bears the No. 20RF1750 and will ask you whether your answer to questions similarly asked you would receive the same answer?

Mr. Minear: Yes. None of these have been paid, however.

Q. Do your records indicate the present balance owing to the Bank of America on these trust receipts? A. Yes.

Q. What is the amount? A. \$36,922.00.

Q. Even?

A. Even. There should be \$26,000.00 outstanding.

Q. Is there interest due on these as well?

A. Yes. The documents provide for interest at the rate of four and one-half percent per annum so that interest would be based, I believe, from the date of the various trust receipts on the various balances.

Mr. Bechtel: I will offer trust receipt No. 20RF1750, together with invoice attached, as evidence. [6]

The Court: These two documents will be received in evidence as Exhibit E of the Bank of America.

Mr. Bechtel: Mr. Minear, I will show you a document entitled "Statement of Trust Receipt Fi-

(Testimony of G. E. Minear.)

financing" and bearing number 106977 and ask you if this is the document which bears the filing stamp of the Secretary of State which was filed in connection with the financing you have previously testified to?

Mr. Minear: Yes.

Q. This document shows that it was filed with the Secretary of State June 30, 1952. Could you testify to whether or not there was financing of this nature prior to the date of the various trust receipts that were offered in evidence?

A. No, I could not testify as to that.

Mr. Bechtel: I wish to offer this document entitled "Statement of Trust Receipt Financing", No. 106977.

The Court: This document will be received in evidence as Exhibit F of the Bank of America.

Mr. Bechtel: I will show you a similar document bearing No. 118013 and ask you if that statement was filed with the Secretary of State in connection with this financing as well? A. Yes.

Q. I would like to offer this document No. 118013 in evidence.

The Court: It will be received in evidence as Exhibit G of Bank of America.

Mr. Bechtel: I will show you a third document [7] entitled "Affidavit Concerning Statement of Trust Receipt Financing, with the number 128304, was that likewise filed in connection with financing heretofore testified to? A. Yes.

Mr. Bechtel: I would also like to offer this document in evidence.

(Testimony of G. E. Minear.)

The Court: It will be received as Exhibit H of Bank of America.

Mr. Bechtel: May we also request that these three documents be photostated and the originals released to us.

The Court: You may arrange for substitution of photostatic copies of any exhibit you have introduced. You may do so with my clerk. She will send them out and have them photostated and make the substitution and return the originals to you. The person making the request must pay the cost of photostating.

Mr. Bechtel: I understand that included in the documents which have been introduced in evidence is the description of a scraper which has been sold but on which delivery has not been made?

Mr. Minear: Yes. That is on receipt No. 1837, scraper No. D-0131. I think the date stamp is on the outside of that, dated August 8 or 9th—August 9th.

Q. So it was released from the trust receipt by the bank? A. Yes.

Q. Is the scraper still on the premises?

A. Right.

Q. Do you know to whom it was sold?

A. No, I don't know.

Q. It was sold to some third party not involved in these proceedings? [8]

A. Right. What the bank received was just the amount indicated on the trust receipt.

(Testimony of G. E. Minear.)

Mr. Joy: Have you made any inspection of the Miller Scraper premises?

Mr. Minear: Not personally. I have not gone by and checked it over. I have never been on the premises itself.

Q. You have not made any inspection to determine whether the scrapers of these particular serial numbers on the trust receipts were on the property?

A. I did not personally. They were made once or twice each month by the bank. The manager of the Selma branch informed me yesterday that he had inspected them.

Q. Were there any other documents executed by Consolidated Distributors or Bank of America or Miller Scraper in connection with these transactions?

A. No.

Q. No others in your file?

A. No.

Mr. Bechtel: Was there, in addition to the documents, a promissory note taken?

A. No. Just the documents in evidence.

The Court: Does your record indicate when the Bank of America received scraper No. D-1031 that has been sold?

Mr. Minear: Just the date stamped on the trust receipt—approximately August 9th.

Q. The amounts indicated on the trust receipts and the invoice attached thereto—how were they paid?

A. They were paid to Miller Scraper by the bank direct. [9]

Mr. Bechtel: I have no further questions.

CHARLES R. MILLER

Called as a witness by Mr. Joseph L. Joy, on behalf of the Trustee of Miller Scraper and Mfg. Co., being first duly sworn, testified as follows:

Mr. Joy: Your name is Ray Miller?

Mr. Miller: Charles R. Miller.

Q. Will you tell the Court your connection with Miller Scraper Co.?

A. I was a brother of the owner who was Kenneth L. Miller and my capacity was office manager and I took care of various office duties that came up.

Q. Are you familiar with the Miller Scraper premises down there? A. Yes.

Q. We have been discussing certain rotary scrapers that are involved in certain trust receipts with the Bank of America and Consolidated Distributors. Are you familiar with these pieces of equipment? A. Yes, I am.

Q. Will you tell us where these pieces of equipment are located on the Miller premises?

Mr. Bechtel: Please, for the record, I would like to enter an objection to any testimony regarding the location of the scrapers at this time. My purpose, I believe that under trust receipt financing the question of changing of possession is involved and I would like to preserve my rights by entering an objection.

Objection overruled. [10]

Mr. Joy: Now, will you tell us where these scrapers are located on the premises of Miller Scraper Co?

(Testimony of Charles R. Miller.)

Mr. Miller: We have approximately four acres there. The buildings, I would say, take up possibly one acre of the property—the rest is just open ground. They are located on the back portion of our property. They are grouped together, kept together back there.

Q. Is the property fenced? A. No.

Q. Unfenced? A. Unfenced.

Q. Does the Miller Scraper Co. store any property on the four acre plot which is not covered with buildings?

A. We made three different types of equipment that were involved with Consolidated.

Q. What other types of equipment do you make?

A. Reversible disc plows and a forage wagon.

Q. Where was that equipment stored with relation to the scrapers?

A. Some of it was located near where the scrapers were stored. Others were located closer to the buildings, over next to the office.

Q. Do you also make Miller orchard heaters?

A. We discontinued them about three years ago.

Q. Are any of those stored down there on the premises? A. Yes. There are two.

Q. Where, with reference to the scrapers, are these orchard stoves or heaters stored? [11]

A. They were stored clear to the far end of the property, down in what we call our junk pile. They are no longer usable. The motors have been pulled out.

Q. Looking from the highway—first there are

(Testimony of Charles R. Miller.)

the buildings near Manning Avenue, then behind the building toward the rear, there are located these rotary scrapers? A. Yes.

Q. Behind that, there are the orchard heaters?

A. Yes, and other obsolete pieces of equipment.

Q. Are there any signs or identification placed on these rotary scrapers to indicate to whom they belong? A. No, there is not.

Q. Are these groups of scrapers close together?

A. Actually, the main part of them are in one line—then we have two or three others on the other side of the building that for some reason or other we have made improvements or repaired them. They have been sitting there for a matter of months and we have had to make minor repairs.

Mr. Bechtel: May the record show that my objection will go to all this testimony?

Mr. Joy: And most of these scrapers are in one long line to the rear of the building—then the others are where?

Mr. Miller: Next to the lot—more in front of the buildings.

Q. Between the buildings and Manning Avenue?

A. Right.

Q. How many in that group? A. Three.

Q. But most of them are in the group behind the buildings?

A. Yes, one long line of scrapers. [12]

Q. You were employed as office manager by Miller Scraper Co. at the time these items were sold to Consolidated? A. Yes, I was.

(Testimony of Charles R. Miller.)

Q. Are you familiar with the work in the shop at Miller Scraper Co.?

A. To some extent. I never had much to do with that out there, generally.

Q. You handled the selling or material and equipment as it was prepared for sale or sold?

A. Yes.

Q. These items of equipment—were these all completed in the shop before they were sold?

A. Yes, most generally they were completed in lots of five or ten or fifteen.

Q. Then when they were completed, what was done with them?

A. We made up a billing to the Bank of America for the account of Consolidated and then the money was deposited into our account by the bank.

Q. You know what was done with the machines at the time the billing was made?

A. You mean as to where they were located?

Q. What did you do with them?

A. We usually took them out where they are now and parked them out there. Of course, sometimes there would be a sale come up and they would go right out. Normally, they would be parked out where they are parked now.

Q. There are about twenty-six pieces of equipment there now? [13]

A. Yes.

Q. There were no name tags placed on the machines?

A. No, not on Consolidated's machines.

Q. You said that some repairs were made on

(Testimony of Charles R. Miller.)

the machines from time to time. At whose request were these repairs made?

A. Well, those repairs were not actually repairs. Maybe like the hydraulic line or cylinder shafts, the exposed parts would become rusty. We wouldn't send out a machine like that. We would go ahead and prepare it for shipment. It was usually on our own account that we did that. We didn't want them going out like that.

Q. You did not bill anyone for that work?

A. No.

Q. Were you directed by anyone to do that work?

A. No. Just ourselves. They had to sit out there and naturally being exposed, not under cover, and occasionally a tire will go down or a shaft needs to be polished.

Q. And that work was done whenever you deemed it necessary? A. Yes.

Q. Was any of this equipment ever used for demonstration purposes by Miller.

A. No. There was one used by Consolidated for demonstration purposes.

Q. Miller Scraper didn't ever take any of these machines out for demonstration? A. No.

Q. Were any of those pieces of equipment ever sold by Miller Scraper to a third party? [14]

A. No, not as long as the contract with Consolidated was in effect.

Q. All during the time that the contract was in effect, occasions would not arise where an order

(Testimony of Charles R. Miller.)

would come in and Miller would take one of those machines to fill the order and then replace it?

A. No. They (reference to Consolidated) had exclusive distribution.

Q. In other words, you did no retail selling at all?

A. That is right.

Q. Did Miller Scraper carry any insurance on these rotary scrapers that were stored there?

A. Consolidated carried the insurance.

Q. None was carried by Miller?

A. No.

Mr. Joy: I believe that is all.

Mr. Bechtel: Were you a stockholder of Miller Scraper Co.?

Mr. Miller: No.

Q. Do you know who the stockholders were?

A. Kenneth Miller had all of the stock.

Q. He owned it all?

A. He owned all the stock.

Q. Do you know who the stockholders are of Consolidated Distributors?

A. Well, there has been a change in stockholders in the last year or so. I don't know exactly who they are or what percentages they own right now.

Q. To your knowledge, does your brother, Kenneth Miller, now, [15] or did he ever own any stock in Consolidated?

A. No.

Q. Did you ever own any stock in Consolidated?

A. No.

Q. Do you own any now?

A. No.

Q. Does anyone, to your knowledge, who is connected with Miller Scraper own stock in Consoli-

(Testimony of Charles R. Miller.)

dated? A. Not to my knowledge. No.

Q. Where did Consolidated maintain their local office?

A. In a portion of our building there on the property.

Q. You referred to a contract that was in existence between Miller Scraper Co. and Consolidated relative to the scrapers. Do you know the nature of that contract?

A. Well, no, other than that it gave them exclusive distribution of our scrapers.

Q. How long was this contract in existence, do you know? A. Approximately two years.

Q. When did this contract terminate, do you know?

A. December of 1953, I guess it was.

Q. Has the Miller Scraper Co. operated since that time? A. Yes, we have.

Q. In the manufacture of scrapers?

A. In the manufacture of scrapers and other items.

Q. How was the sale of scrapers handled subsequent to December, 1953 when the contract was terminated?

A. They were handled direct from our office. No other distributor was involved.

Q. Were the scrapers that you manufactured after that date in [16] December which you referred to, were they the identical scrapers that you had previously sold to Consolidated?

A. No, we had an agreement with Consolidated

(Testimony of Charles R. Miller.)

that we would not manufacture any of the size scrapers that they had in stock, that we would manufacture a larger size.

Q. No similar scrapers were manufactured or sold by you after that time.

A. Similar scrapers, but larger capacity.

Q. Do you know of any pieces of equipment that was moved to Chandler Field? A. Yes.

Q. I want to know particularly if it was equipment you moved to Chandler Field or if it was moved by Consolidated?

A. It was not moved by us—it may have been by Consolidated.

Q. You don't know anything about that?

A. No.

Mr. Bechtel: I believe that is all.

Mr. Joy: Mr. Miller, what arrangement was there between Miller Scraper Co. and Consolidated Distributors in regard to the office of Consolidated on your property?

A. Well, our office building is so arranged that it can take care of two individual offices and we just charged them a monthly office rent.

Q. And you rented office space to them?

A. Yes.

Q. Did they have their own office equipment or did you supply it.

A. They had their own office equipment.

Q. Did they have their own telephone there?

A. Yes. [17]

Q. I suppose they had their own post office box?

(Testimony of Charles R. Miller.)

A. Yes.

Q. Did they have any sign on their office indicating that it was the office of Consolidated Distributors?

A. Yes, we had signs out in front indicating that it was the office of Miller Scraper and Mfg. Co. and Consolidated Distributors, Inc.

Q. Where was this sign located?

A. Right over the front door.

Q. And that said, generally, "Offices of Miller Scraper & Mfg. Co. and Consolidated Distributors, Inc."?

A. Yes.

Q. What size was that?

A. I would say approximately twelve by thirty-six inches.

Q. There were no signs anywhere else on the property bearing Consolidated's name?

A. No.

Mr. Joy: That will be all.

Mr. Bechtel: I have no further questions.

JOHN AXMAN

Called as a witness by Mr. Bechtel, being first duly sworn, testified as follows:

Mr. Bechtel: What is your full name?

Mr. Axman: John Axman.

Q. By whom are you employed?

A. At present?

Q. Yes. A. I am unemployed.

Q. Were you ever employed by Consolidated Distributors?

A. Yes. [18]

Q. In what capacity? A. As a salesman.

(Testimony of John Axman.)

Q. When did your employment terminate?

A. At the time Consolidated's contract with Miller Scraper was terminated.

Q. Do you recall when that was?

A. Approximately December of 1952.

Q. That is the date that Mr. Miller testified was the termination date of the contract?

A. Yes. May I clear up one point? Previous to that date I was employed as a salaried employee by Consolidated. Since then, I have sold some of their equipment on a commission basis.

Q. When were you first employed by Consolidated?

A. At the origination of the organization, in 1952.

Q. Approximately when in 1952?

A. Spring of 1952, I believe.

Q. It was prior to the dates which have been recited here as appearing on the trust receipts introduced in evidence?

A. Yes.

Q. And I understand that from the date of your employment until December of 1953 you were a salaried employee?

A. Yes.

Q. By whom were you paid?

A. Consolidated.

Q. Did you receive any payment of money from Miller Scraper?

A. Not prior to that.

Q. You say "not prior"—you mean not prior to December, 1953? [19]

A. That is right.

Q. Were you at that time an officer of the Consolidated Distributors?

(Testimony of John Axman.)

A. During part of that time.

Q. What was your title? A. Director.

Q. Where was the head office of Consolidated Distributors?

A. Fort Morgan, Colorado. For a time they were in Fresno, then moved back to Fort Morgan.

Q. Have they other places of business than this one in Selma? A. Yes.

Q. Were you a stockholder? A. Yes.

Q. Do you know who the other stockholders were? A. Yes.

Q. At any time during your association with Consolidated did any person in Miller Scraper Co. have any interest in Consolidated Distributors?

A. Not to my knowledge.

Q. Was Consolidated strictly a selling organization?

A. Strictly a selling organization.

Q. They did no manufacturing? A. No.

Q. Do you have with you a copy of the contract that was entered into between Consolidated and Miller Scraper? A. No, I don't.

Q. Do you, of your own knowledge, know generally what that contract contained?

A. Generally speaking, yes.

Q. To whom did Consolidated generally sell?

A. To retail dealers throughout the states.

Q. And were these sales made directly by Consolidated?

A. Yes. To the retail dealers. [20]

Q. Would they always be on a cash basis?

(Testimony of John Axman.)

A. No.

Q. In the event credit was extended, by whom was it extended?

A. The credit was extended by Consolidated in conjunction with the Bank of America.

Q. Would you take a contract or open book account?

A. That depended on the financial statement of the individual dealer.

Q. It might be either one? A. Yes.

Q. Was there a time during your association with Consolidated that some of this equipment was moved to Chandler Field? A. Yes.

Q. And is that equipment all part of the equipment described in the trust receipts in evidence?

A. I think that is correct.

Q. What was the purpose in moving them to Chandler Field?

A. For a period of time Consolidated maintained offices at Chandler Field.

Q. Was that office subsequently closed?

A. Yes.

Q. At that time, what happened to the equipment?

A. I think it was taken back and placed on the lot of Miller's along with the rest.

Q. That move was made with the consent of the bank? A. I am sure it was.

Q. Is Consolidated still in business elsewhere?

A. Yes.

Mr. Bechtel: I think that is all.

(Testimony of John Axman.)

Witness questioned by Mr. Joy. [21]

Mr. Joy: Did Consolidated continue to maintain an office at Miller Scraper after the termination of the contract in December, 1953?

Mr. Axman: I might have to go around—after the 1953 contract was terminated, we made another contract with Miller in December, 1953 and this contract was that we would work together to dispose of Consolidated's merchandise. At that time I had an office in Miller Scraper Co.

Q. You paid rent for that office? A. Yes.

Q. Did Consolidated pay for it or did you personally pay it? A. Consolidated paid it.

Q. Is there any office equipment or furniture of Consolidated's on the Miller premises now?

A. Yes.

Mr. Joy: I think that is all.

The Court: That will be all, Mr. Axman.

Mr. Bechtel: I would like to offer to the Trustee a stipulation at this time that the bank or Mr. Axman or anyone at the bank who has control, that this equipment be sold as promptly as possible and that whatever claim or interest the Trustee may have, as later determined, then pass on to the Receiver without prejudice to either party's interest. I think that we will realize much less for the equipment if the delay is much longer, as this is probably the height of the season.

Mr. Joy: It is agreed. It is stipulated that the items on the trust receipts may be sold and the funds to be impounded.

The Court: The funds are to be delivered to the Trustee and be [22] impounded by him in a separate bank account and that the one piece of equipment now already sold will be turned over and delivered to the buyer thereof upon payment to the Trustee by Bank of America of \$2273.00. And that all right, title and interest of Consolidated Distributors and the Bank of America will be transferred to the proceeds of said sale, without prejudice to the rights of any of the parties involved. This is merely a stipulation. Also, that the equipment be valued at the usual price as they have been sold in the past, unless with the consent of all parties involved, including the Trustee.

Mr. Joy: I would also like to stipulate that Miller Scraper four and one-half cubic yard, serial No. D-0131 listed on trust receipt No. 29RF1837 can be immediately released upon payment to the Receiver of the sum of \$2273.00 by Bank of America, said sum to be impounded by the Receiver pending the determination of the rights and liens of the various parties in and to said property, and/or the proceeds of sale thereof, all of which rights and liens will transfer to the said proceeds and without prejudice to the rights of the parties.

Mr. Bechtel: I will stipulate to that on behalf of the Bank.

The Court: The stipulation is approved.

The Court: Court will adjourn now and the case will be continued for all purposes until a time to be agreed upon. [23]

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Fresno, California

August 20, 1954

Order to Show Cause vs. Consolidated Distributors and Bank of America, why the Bank of America should not appear and show the nature and effect and validity of any interest or lien that it may have in or to any of the property of the bankrupt in the above matter.

Present in court was Mr. Joseph L. Joy, 1405 Security Bank Building, Fresno, California, attorney for the Trustee in Bankruptcy of Miller Scraper & Mfg. Co., Inc., and Mr. H. H. Bechtel of San Francisco, California, attorney for the Bank of America.

Whereupon the proceedings were had and the following is the testimony of

MR. CHARLES R. MILLER

to-wit:

Mr. Miller was sworn by the Referee.

Mr. Joy: Your name is Ray Miller?

Mr. Miller: Charles R. Miller.

Q. Will you tell the court your connection with Miller Scraper Co.?

A. I was a brother of the owner, who was Kenneth L. Miller and [1]* my capacity was office man-

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Charles R. Miller.)

ager and I took care of various office duties that came up.

Q. Are you familiar with the Miller Scraper premises down there? A. Yes.

Q. We have been discussing certain rotary scrapers that are involved in certain trust deeds with the Bank of America and Consolidated Distributors. Are you familiar with these pieces of equipment. A. Yes, I am.

Q. Will you tell us where these pieces of equipment are located on the Miller premises?

Mr. Bechtel: Please, for the record, I would like to enter an objection to any testimony regarding the location of the scrapers at this time. My purpose—I believe that under trust deed financing question of changing of possession is involved and I would like to preserve my rights by entering an objection.

Objection overruled by Referee.

Mr. Joy: Now, will you tell us where these scrapers are located on the premises of Miller Scraper Company?

Mr. Miller: We have approximately 4 acres there. The buildings I would say, take up possibly one acre of the property. The rest is just open ground. They are located on the back portion of our property. They are grouped together, kept together back there.

Q. Is the property fenced? A. No.

Q. Unfenced? A. Unfenced. [2]

Q. Does the Miller Scraper Co. store any prop-

(Testimony of Charles R. Miller.)

erty on the four acre plot which is not covered with buildings?

A. We made three different types of equipment that was involved with Consolidated.

Q. What other types of equipment do you make?

A. Reversible disc plows and a forage wagon.

Q. Where was that equipment stored with relation to the scrapers?

A. Some of it was located near where the scrapers were stored. Others were located closer to the buildings, over next to the office.

Q. Do you also make Miller orchard heaters?

A. We discontinued them about 3 years ago.

Q. Are any of those stored down there on the premises? A. Yes, there are two.

Q. Where, with reference to the scrapers, are these orchard heaters stored?

A. They were stored clear to the far end of the property, down in what we call our junk pile. They are no longer usable. The motors have been pulled out.

Q. Looking from the highway — first there are the buildings near Manning Avenue, then behind the buildings, toward the rear, there are located these rotary scrapers. A. Yes.

Q. Behind that there are the orchard heaters?

A. Yes, and other obsolete pieces of equipment.

Q. Are there any signs or identification placed on these rotary scrapers to indicate to whom they belong? A. No, there is not.

Q. Are these groups of scrapers close together?

(Testimony of Charles R. Miller.)

A. Actually, the main part of them are in one line. Then we have two or three others on the other side of the building that for some reason or other we have made improvements or repaired them. They have been sitting there for a matter of months and we have had to make minor repairs.

Mr. Bechtel: May the record show that my objection will go to all this testimony?

Mr. Joy: And most of these scrapers are in one long line to the rear of the building? Then the others are where?

Mr. Miller: Next to the lot—more in front of the buildings.

Q. Between the buildings and Manning Avenue?

A. Right.

Q. How many in that group? A. Three.

Q. But most of them are in the group behind the buildings?

A. Yes, one long line of scrapers.

Q. You were employed as office manager by Miller Scraper Co. at the time these items were sold to Consolidated? A. Yes.

Q. Are you familiar with the work in the shop at Miller Scraper Co.?

A. To some extent. I never had much to do with that out there, generally. [4]

Q. You handled the selling or material and equipment as it was prepared for sale or sold?

A. Yes.

Q. These items of equipment, were these all completed in the shop before they were sold?

(Testimony of Charles R. Miller.)

A. Yes, most generally they were completed in lots of five or ten or fifteen.

Q. Then when they were completed, what was done with them?

A. We made up a billing to the Bank of America for the account of Consolidated and then the money was deposited into our account by the bank.

Q. You know what was done with the machines at the time the billing was made?

A. You mean as to where they were located?

Q. What did you do with them?

A. We usually took them out where they are now and parked them out there. Of course, sometimes there would be a sale come up and they would go right out. Normally, they would be parked out where they are parked now.

Q. There are about 26 pieces of equipment there now? A. Yes.

Q. There were no name tags placed on the machines?

A. No, not on Consolidated's machines.

Q. You said that some repairs were made on the machines from time to time. At whose request were these repairs made?

A. Well, those repairs were not actually repairs—maybe like the hydraulic line becomes rusty, or the cylinder shafts—the exposed parts become rusty. We wouldn't send out a [5] machine like that. We would go ahead and prepare it for shipment. It was usually on our own account that we did that. We didn't want them going out like that.

(Testimony of Charles R. Miller.)

Q. You did not bill anyone for that work?

A. No.

Q. Were you directed by anyone to do that work?

A. No, just ourselves. They had to sit out there and naturally being exposed, not under cover and occasionally a tire will go down or a shaft needs to be polished.

Q. And that work was done whenever you deemed it necessary? A. Yes.

Q. Was any of this equipment ever used for demonstration purposes by Miller?

A. No. There was one used by Consolidated for demonstration purposes.

Q. Miller Scraper didn't ever take any of these machines out for demonstration? A. No.

Q. Were any of those pieces of equipment ever sold by Miller Scraper to a third party?

A. No, not as long as the contract with Consolidated was in effect.

Q. All during the time that the contract was in effect, occasions would not arise where an order would come in and Miller would take one of those machines to fill the order and then replace it?

A. No. They (Consolidated) had exclusive distribution.

Q. In other words, you did no retail selling at all? [6] A. That is right.

Q. Did Miller Scraper carry any insurance on these rotary scrapers that were stored there?

A. Consolidated carried the insurance.

(Testimony of Charles R. Miller.)

Q. None was carried by Miller? A. No.

Mr. Joy: I believe that is all.

Witness questioned by Mr. Bechtel.

Mr. Bechtel: Were you a stockholder of Miller Scraper Co.?

Mr. Miller: No.

Q. Do you know who the stockholders were?

A. Kenneth Miller had all of the stock.

Q. He owned it all?

A. He owned all the stock.

Q. Do you know who the stockholders are of Consolidated Distributors?

A. Well, there has been a change in stockholders in the last year or so. I don't know exactly who they are or what percentage they own right now.

Q. To your knowledge, does your brother, Kenneth Miller now, or did he ever own any stock in Consolidated? A. No.

Q. Did you ever own any stock in Consolidated?

A. No.

Q. Do you now? A. No.

Q. Does anyone, to your knowledge, who is connected with Miller Scraper own stock in Consolidated?

A. Not to my knowledge. No. [7]

Q. Where did Consolidated maintain their local office?

A. In a portion of our building there on the property.

Q. You referred to a contract that was in existence between Miller Scraper Co. and Con-

(Testimony of Charles R. Miller.)

solidated Distributors relative to the scrapers. Do you know the nature of that contract?

Q. Well, no, other than it gave them exclusive distribution on our scrapers.

Q. How long was this contract in existence, do you know? A. Approximately two years.

Q. When did this contract terminate, do you know?

A. December, 1953, I guess it was.

Q. Has the Miller Scraper Co. operated since that time? A. Yes, we have.

Q. In the manufacture of scrapers?

A. In the manufacture of scrapers and other items.

Q. How was the sale of scrapers handled subsequent to December, 1953, when the contract was terminated?

A. They were handled direct from our office, no other distributor was involved.

Q. Were the scrapers that you manufactured after that date in December which you referred to, were they identical scrapers that you had previously sold to Consolidated?

A. No, we had an agreement with Consolidated that we would not manufacture any of the size scrapers that they had in stock, that we would manufacture a larger size.

Q. No similar scrapers were manufactured or sold by you after that time? [8]

A. Similar scrapers, but larger capacity.

Q. Do you know of any pieces of equipment

(Testimony of Charles R. Miller.)

that were moved to Chandler Field? A. Yes.

Q. I want to know particularly if it was equipment you moved to Chandler Field or if it was moved by Consolidated?

A. It was not moved by us. It may have been by Consolidated.

Q. You don't know anything about that?

A. No.

Mr. Bechtel: That will be all.

Witness questioned by Mr. Joy.

Mr. Joy: Mr. Miller, what arrangement was there between Miller Scraper Co. and Consolidated Distributors in regard to the office of Consolidated on your property?

Mr. Miler: Well, our office building is so arranged that it can take care of two individual offices and we just charged them a monthly office rent.

Q. And you rented office space to them?

A. Yes.

Q. Did they have their own office equipment or did you supply it?

A. They had their own office equipment.

Q. Did they have their own telephone there?

A. Yes.

Q. I suppose they had their own post office box?

A. Yes.

Q. Did they have any sign on their office indicating that it was the office of Consolidated Distributors?

A. Yes, we had signs out in front indicating

(Testimony of Charles R. Miller.)

that it was [9] the office of Miller Scraper Co. and Consolidated Distributors.

Q. Where was this sign located?

A. Right over the front door.

Q. And that said generally, "Offices of Miller Scraper Co. and Consolidated Distributors?"

A. Yes.

Q. What size sign was that?

A. I would say approximately twelve by thirty-six.

Q. There were no signs anywhere else on the property bearing Consolidated's name?

A. No.

Mr. Joy: I believe that is all. [10]

[Endorsed]: Filed June 3, 1955.

In the United States District Court, Southern District of California, Northern Division

No. 8097

BANK OF AMERICA,

Plaintiff,

vs.

MILLER SCRAPER and MANUFACTURING
COMPANY, and CONSOLIDATED DIS-
TRIBUTORS, INCORPORATED,

Respondents.

TRANSCRIPT OF PROCEEDINGS

Continuance of Hearing of Order to Show Cause

why Bank of America should not appear and show the nature and extent and validity of any interest or lien that it may have in or to any of the property of Miller Scraper and Manufacturing Company.

Mr. H. H. Bechtel of San Francisco, California, was present representing the Bank of America, Mr. Eckhart A. Thompson of Fresno, California, representing Joseph L. Joy, Trustee of Miller Scraper and Manufacturing Company, and Messrs. Charles R. Barrett and Dan Jensen, representing Consolidated Distributors, Inc.

The above-entitled matter came on for hearing on October 14, 1954, at the hour of 10:00 o'clock a.m. before William A. McGugin, Referee in Bankruptcy.

Whereupon, the following proceedings were had and testimony taken, to wit: [1]*

Mr. Barrett: On August 20 of this year there was a hearing on an Order to Show Cause brought by the Trustee of this bankrupt against the Bank of America. I have read the transcript on that case and it appears that at that date it developed that Consolidated Distributors also had an interest and the matter was continued to this time. A new Order to Show Cause appears in the file directed both against Bank of America and Consolidated. Mr. Dan Jensen and myself are representing Consolidated Distributors and Mr. Bechtel is here again

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

for Bank of America. It does not appear that counsel for the Trustee is here yet.

Recess of 5 minutes to call Eckhart A. Thompson, attorney for the Trustee of Miller Scraper & Mfg. Co.

The Court: Are we ready to proceed with the continued hearing upon an Order to Show Cause why Consolidated Distributors, Inc. and Bank of America should not show and establish the nature and amount and validity of any claims or liens they have against the assets of the bankrupt, Miller Scraper and Manufacturing Co.

Mr. Barrett: Ready for Consolidated Distributors.

Mr. Thompson: Ready for the Trustee.

Mr. Bechtel: Ready for Bank of America.

Mr. Barrett: I will call Mr. W. A. Reynolds.

W. A. REYNOLDS

called as a witness on behalf of Consolidated Distributors, Inc., being first duly sworn, testified as follows: [2]

Mr. Barrett: Would you state your full name?

Mr. Reynolds: Wayne Albert Reynolds.

Q. Where do you reside?

A. 4614 East Fillmore, Fresno.

Q. What is your present occupation?

A. Dealer in industrial equipment and machinery.

Q. Heavy industrial equipment? A. Yes.

Q. How long have you been actively engaged in business, in dealing in heavy equipment?

(Testimony of W. A. Reynolds.)

A. Of this nature?

Q. Just generally speaking—how many years?

A. About 15 years.

Q. What is Consolidated Distributors, Inc?

A. It is a distributing firm operating expressly to distribute heavy earth moving equipment.

Q. It is a California corporation?

A. Yes.

Q. Admitted to do business in this state?

A. Yes.

Q. Was there a prior organization?

A. Yes.

A. Previous to its organization it had done business as Industrial Equipment Company, Inc.?

A. Yes.

Q. Consolidated Distributors is a separate business entity to the past named business?

A. That is right.

Q. In 1952 were you an officer of Consolidated Distributors? If so, what office did you hold?

A. President of Consolidated Distributors.

Q. You are acquainted with Mr. Ray Miller and Mr. Kenneth Miller and they are officers of Miller Scraper & Mfg. Co.? A. Yes. [3]

Q. You were acquainted with them in business?

A. Yes.

Q. Where did the Miller Scraper Co. do business in Fresno County?

A. On Highway 99 and Manning Avenue.

Q. That is a short distance from Selma?

A. Yes.

(Testimony of W. A. Reynolds.)

Q. Did Consolidated Distributors also do business at the same location? A. Yes.

Q. Consolidated Distributors and Miller Scraper had offices in the same frame building situated near the intersection of Manning Avenue and Highway 99? A. That is right.

Q. How large was this building, about?

A. About 16 by 30 feet, I believe.

Q. And the main doorway—by the way, how many entrances led from the outside to the inside of this building? A. One.

Q. Just one front entrance on the building on the Manning Avenue side? A. Correct.

Q. Was there any porch on that building?

A. Yes.

Q. Were there any signs on the porch?

A. Yes.

Q. What was on the signs?

A. Consolidated Distributors and Miller Scraper.

Q. Did not the sign say Offices of Consolidated Distributors, Incorporated and Miller Scraper and Manufacturing Company—didn't it list both corporations? A. Yes.

Q. Was there any sign on the doorway leading from the outside to the inside?

A. On the doorway? No.

Q. Was there a sort of hallway on the inside?

A. Yes.

Q. And there was a door from that hallway to the inner [4] offices? A. Yes. Right.

Q. Was there any sign on that doorway?

(Testimony of W. A. Reynolds.)

A. Yes.

Q. What was on that sign?

A. Miller Scraper & Manufacturing Co.

Q. Was there a sign, roughly on the left, leading into the private offices, from the hallway?

A. Yes.

Q. What did that sign say?

A. Consolidated Distributors.

Q. This sign was on the door leading to the private offices of Consolidated Distributors?

A. Yes.

Q. And the sign said Consolidated Distributors, Inc.?

A. Yes.

Q. Did Consolidated Distributors pay any rent for the use of these offices.

A. Yes.

Q. To whom was it paid, and how much?

A. We paid \$50 a month to Miller Scraper.

Q. Cash each month during the period of occupancy?

A. Cash or credit.

Q. To whom was it paid?

A. To Ray Miller, usually, who was office manager and took care of that part of the business.

Q. Did Miller Scraper and Consolidated have separate stationery and billheads?

A. Yes.

Q. Did the corporations I just named have separately listed telephone numbers?

A. Yes.

Q. What was the telephone number of Consolidated Distributors, do you recall? If you can't recall, it isn't important.

A. It was a Fowler number, I can't recall it.

Q. But you recall separate listings in the tele-

(Testimony of W. A. Reynolds.)

phone directory? A. Yes.

Q. Did Consolidated Distributors have separate post office mailing address from Miller Scraper?

A. Yes.

Mr. Barrett: Mr. Thompson, I believe you have seen and inspected the matters I am going to refer to next?

Mr. Thompson: I have not had a chance to read them.

Mr. Barrett: What was your capacity in the office?

Mr. Reynolds: Sales manager.

Q. Sales manager as well as president?

A. Yes.

Q. You actually ran the office? A. Yes.

Q. About what time during what year and month was it that Consolidated Distributors opened its office?

A. The 15th of June, 1952. The office was just built and we took occupancy before it was quite finished.

Q. Inside your office you had desks, filing cabinets and other office equipment? A. Yes.

Q. You were there during business hours?

A. Yes.

Q. You had some girls working for you?

A. I had one girl.

Q. On the other side, in the offices of Miller Scraper, who was in that office?

A. Ray Miller and a Mr. Huxley.

Q. Did they have an office girl? A. No.

(Testimony of W. A. Reynolds.)

Q. Did they have desks, filing cabinets and other office equipment in that office? A. Yes. [6]

Q. Was there a written agreement made between Consolidated Distributors, Inc., and Miller Scraper relative to the business relationship of the companies? A. Yes.

Q. That written agreement, who had part in negotiating it, did you? A. Yes.

Q. Was it an agreement under which business was conducted by these two organizations?

A. Yes.

Q. I will show you a written agreement bearing date of March 20, 1952. It is a confirmed agreement, not actually signed and bears the certification of the County Recorder of Fresno County, certifying that this is a true and correct record from the public records of Fresno County. Would you tell us if this is the agreement entered into between the company you represent and Miller Scraper Company? A. Yes, it is.

Mr. Barrett: I move, your Honor, that this be received as the exhibit first in order for Consolidated Distributors.

The Court: Received as Exhibit A for Consolidated Distributors.

[See pages 191-204]

Mr. Barrett: I am going to show you a second agreement, which is actually an amended and supplemental agreement dated April 4, 1952. Do you recognize it? A. Yes.

(Testimony of W. A. Reynolds.)

Q. The previous agreement was amended by this later supplemental agreement?

A. That is right.

Q. It also bears the certification of the County Recorder that it is a true and correct copy of the public records of this county?

A. Yes, that is correct.

Mr. Barrett: Your Honor, I move that this second agreement be [7] received as the exhibit next in order for Consolidated.

The Court: Received as Exhibit B for Consolidated Distributors.

[See pages 204-212]

Mr. Bechtel: I would like to make a suggestion that the exhibits being offered by Consolidated Distributors bear a different designation than those offered by Bank of America.

The Court: Such as?

Mr. Bechtel: Well, such as numbers instead of letters. We have exhibits designated as Exhibit A, Exhibit B, and so on. Couldn't Consolidated's exhibits be Exhibit 1, Exhibit 2?

The Court: We have the Trustee's exhibits numbered. It makes for easy reference.

Mr. Bechtel: Well, I would suggest that Consolidated's exhibits be marked Exhibit A-1.

Mr. Barnett: Could we have them marked Consolidated's Exhibit A?

Mr. Bechtel: In other words, Consolidated's exhibits will be indicated by Consolidated Exhibit A.

The Court: The second contract, dated April 4,

(Testimony of W. A. Reynolds.)

1952, will be received and marked Exhibit B of Consolidated Distributors.

Mr. Barnett: These two agreements are the basic agreements under which these two companies conducted their respective business affairs?

Mr. Reynolds: Yes.

Q. Under paragraph 3, is it true that Consolidated Distributors took all of the output of Miller Scraper insofar as scrapers were concerned, of every size, kind and nature? A. Yes. [8]

Q. Would you describe for the Court the premises other than the office building we already described. The manufacturing plant, it is housed in two rectangular corrugated steel buildings?

A. Yes.

Q. The premises of Miller Scraper Company are roughly round in shape, are they?

A. More triangular because of the railroad and highway. The premises are bounded on the west by the railroad track, right beyond which lies Highway 99.

Q. Highway 99 and Manning Avenue?

A. Right.

Q. Can you give us an estimate of how many acres the premises covers? A. About 4 acres.

Q. These two corrugated steel buildings housing the manufacturing plant of Miller Scraper are located at an angle? A. Right.

Q. Situated in an L shape? A. Right.

Q. They are situated, each of them, on that por-

(Testimony of W. A. Reynolds.)

tion of the premises next to the intersection of Manning Avenue and the railroad?

A. Right.

Q. The office building was situated in an easterly direction from that point? A. Yes.

Q. South of these buildings, including the manufacturing buildings and the office was a small shed used as a paint shop by Miller Scraper?

A. Yes.

Q. It was actually a substantial corrugated building? A. Yes.

Q. Would you describe what was the last operation in the process of the manufacture of scrapers—what did it consist of? [9]

A. The last process was painting, and mounting and airing tires.

Q. They were painted in the paint shop on the premises? A. Yes.

Q. What happened after the last process was done on a particular scraper?

A. It was delivered to our lot.

Q. What happened then and where on the lot were they delivered? Where was the lot?

A. Our lot could be described as the Northeast portion of this piece of land that Miller set aside exclusively for the storing of Consolidated Distributors' equipment.

Q. Quoting you the language of paragraph 3 of this agreement, as amended, "The Miller Scraper & Manufacturing Co. agrees that the scrapers are to be delivered to the distributor FOB carrier at

(Testimony of W. A. Reynolds.)

Selma, California, or are to be stored, etc.” What portion of the premises was used as a storage place? The portion you just described?

A. Yes.

Q. How much land did that portion occupy?

A. About one-fourth of the premises.

Q. When Miller Scraper had completed painting and airing the tires, did they just take these scrapers out and park them in your yard?

Objection by Mr. Thompson. Objection overruled.

Q. With respect to these scrapers that were pulled over there by Miller——? [10]

A. They were pulled by one of his men.

Q. By what method were they pulled?

A. By tractor.

Q. Did this tractor have any sign indicating it was property of Miller Scraper? A. No.

Q. A J. I. Case Model S which is a plain farm tractor? A. Yes.

Q. In what manner were the scrapers lined up or disposed of?

A. In groups according to size as near as possible—No. 2, 3, 4½, 6½, and left in line. Sometimes when we had a large inventory we had to make two lines.

Q. Sometimes one line and sometimes two?

A. Yes.

Q. Miller’s service man would unhook them and leave them there? A. Yes.

Q. These scrapers were parked in a certain portion of the premises? A. Right.

(Testimony of W. A. Reynolds.)

Q. The same portion of the premises that you previously testified took up one-fourth of the area?

A. That is right.

Q. At that point, after the scrapers were unhooked and parked, did Miller at any time thereafter take any scrapers out or exercise any control over them? A. No.

Q. At the time Miller Scraper unhooked the scrapers, was there any representative of Consolidated there to inspect the machines? A. Yes.

Q. Who was there and what was done?

A. Either myself or my son, James Reynolds, was there to inspect the scraper, the workmanship, and get the model and [11] serial number.

Q. And if these were all found to be in good order, what was done?

A. The machine was received.

Q. Were there any documents filled out by you or by James Reynolds, your son?

A. We had inspection reports made out by Mr. Miller's men and receipted by us.

Q. The receipt was also signed by Mr. Miller's men?

A. They delivered the equipment and actually he was supposed to do this himself, but my son or I signed our own inspection and delivery receipts.

The Court: As each machine was pulled over from the storage there was a representative there from Consolidated Distributors?

A. We were on the grounds and in the office at all times.

(Testimony of W. A. Reynolds.)

The Court: When these various tractors pulled the equipment over to the storage lot and delivered them to Consolidated Distributors did Mr. Miller unhook them or did he have one of his representatives there at the time?

A. Either one. Either Mr. Miller or one of his representatives.

The Court: And the inspection sheet showing the condition of the equipment and the serial number and so forth was filled out and signed by you as having been delivered by Miller Scraper?

A. Yes. Either by me or by my son.

Mr. Barrett: You kept the original of that inspection sheet?

A. It was kept in Miller's office. We had a copy.

Q. At the time and place when you and your son would receive [12] these scrapers, did you or your son also make out documents entitled "Trust Receipts"? A. Yes.

Q. At the time the newly manufactured scrapers were unhooked from the tractor to be inspected for workmanship, serial number, and so forth?

A. Yes.

Q. You identified them by numbers which indicated which scraper you received?

A. Right.

Q. Did you enter the serial number on the trust receipt? A. Yes.

Q. Referring again to the contents of this written agreement, Exhibit A1 for Consolidated in this hearing which calls for delivery of equipment

(Testimony of W. A. Reynolds.)

on the 1st and 15th of each month. When did you receive invoices from Miller Scraper?

A. On the 1st and 15th.

Q. At that time were they attached to the Trust Receipts?

A. At that time we attached our copy to the Trust Receipts.

Q. In other words, as soon as you received an invoice from Miller Scraper it was attached to the Trust Receipt. A. Yes.

Mr. Barrett: Your Honor, at the previous hearing, the Trust Receipts and attached documents were received in evidence. May I have them just so I can identify them for this record?

Mr. Bechtel: I believe they were later withdrawn and photostated.

Mr. Minear: I have the originals.

Mr. Barrett: Your Honor, I have the originals here, if there is no objection with reference to these. [13]

Mr. Thompson: No objection.

Mr. Barrett: Mr. Reynolds, I show you documents which have been previously introduced in evidence and photostats were made and substituted. You see these 5 documents? A. Yes.

Q. On green papers? A. Yes.

Q. With attached invoices? A. Yes.

Q. These documents which are Exhibits A, B, C, D and E respectively are the Trust Receipts that you spoke of? A. Yes.

Q. I notice that all of these papers are signed

(Testimony of W. A. Reynolds.)

by James Reynolds—he is your son? A. Yes.

Q. This is his signature? A. Yes.

Q. The description of these scrapers, the year, model number, capacity and serial number, these were obtained by you or your son, were they not?

A. Yes.

Q. You have before you the Trust Receipts. They have various column headings. The first heading is “year”. Under that heading appears in each case “1953”. Is that the year these scrapers were pulled out and parked on your lot? A. Right.

Q. The next heading is “Make”. Without exception it appears as “Miller”. That refers to Miller Scraper & Mfg. Co.? A. Right.

Q. The next heading is “Article”—under that appears “Rotary Scraper”—then by its capacity in yards—2 cubic yards, or 3 or 4½ cubic yards, and so forth—correct? A. Yes.

Q. At the time you examined these scrapers you observed their capacity? A. Yes. [14]

Q. The next heading is “Model”—these show various models. A. Right.

Q. The next is “Serial Number”. The serial numbers have a letter preceding them—A, B, C, D?

A. Right.

Q. A, B, C, and D before these serial numbers designates size? A. That is right.

Q. The next heading is “Cost” with figures in dollars and cents? A. Right.

Q. The next heading is “Release Price” which

(Testimony of W. A. Reynolds.)

is filled in. Did you or your son fill in the cost or release price?

A. Yes. We made them out after the face of the Trust Receipt was filled out — after we had the Trust Receipts.

Q. You filled out and completed these documents? A. Yes.

Q. Attached to each one of these Trust Receipts are copies of invoices which I assume are separately represented in record as exhibits. Do you see the number of invoice copies attached to each receipt? A. Yes.

Q. These being copies of Miller's? A. Yes.

Q. You observe these invoices as dated on or near the first or middle of each month?

A. Right.

Q. Were these copies and invoices received by Consolidated Distributors from Miller Scraper Co.?

A. Yes.

Q. When you received the equipment you attached all your papers to the Trust Receipts?

A. Right.

Q. And the invoice states the aggregate amount of the billing for scrapers theretofore turned over to you? A. Yes. [15]

Q. Then what was your procedure when the invoice had been received and the Trust Receipt was completely filled out and executed by you or your son? A. We took them to the bank.

Q. That is, you took them to the Bank of America's branch in Selma? A. Right.

(Testimony of W. A. Reynolds.)

Q. How was financing on these units handled?

A. Well, if I understand your question correctly, the Bank of America floored and financed 90% of the manufacturer's cost. It shows on the Trust Receipt.

Q. It shows on the face of the Trust Receipt that they advanced 90% of the manufacturer's cost?

A. Yes.

Q. At the time the papers were delivered to the Bank of America in Selma, at that time did they immediately withdraw funds and deposit them to the account of Miller Scraper Co.? A. Yes.

Q. At that time did the bank retain the Trust Receipts and attached documents? A. Yes.

Q. At that time you considered these articles floored? A. Yes.

Q. You considered that you held them as trustee for the bank? A. We did.

Q. Do you know Mr. Jess Forrest, manager of the Selma branch of the bank? A. Yes.

Q. Is he the one your company dealt with?

A. Yes.

Q. Going back to the scrapers, when the Miller employees unhooked these scrapers, what would happen if you or your son [16] or yourself discovered an imperfection in quality or workmanship?

A. We would call their attention to it and reject the scraper until it was adjusted.

Q. You would tell them you would not take it?

A. Not until it was made right.

Q. What happened then?

(Testimony of W. A. Reynolds.)

A. In some instances they returned them to the factory and made the proper adjustments.

Q. In some instances they completely tore them down and ran them through the assembly line again? A. Yes.

Q. And after they were adjusted they were returned to you? A. Yes.

Q. At which time you filled out the Trust Receipts? A. Yes.

Q. During the period of time covered by the contract you took all the scrapers manufactured by this company? A. Yes.

Q. This contract ended in December, 1953 between your company and Miller Scraper & Manufacturing Co.? A. Yes.

Q. All of the scrapers listed by serial number on the Order to Show Cause in these proceedings were manufactured prior to December, 1953?

A. Right.

Q. They all appear on the Trust Receipts?

A. Right.

Q. And all were identified by you or your son by serial number before they were put on Trust Receipts? A. Yes.

Q. You have within the last day or two visited the premises of Miller Scraper? A. Yes. [17]

Q. You counted and otherwise identified the scrapers there? A. Yes.

Q. What other articles, if any, were manufactured by Miller Scraper & Mfg. Co. during this time?

(Testimony of W. A. Reynolds.)

A. They manufactured a green feed wagon.

Q. A green feed wagon? How many did they manufacture?

A. To my knowledge—that is a hard question—I think about six.

Q. Just a small number during this entire period of time?

A. I am judging on the amount in and around the vicinity of the factory.

Q. At all times were the scrapers delivered over to you by Miller kept segregated from all other machinery of all types, including wagons?

A. Yes.

Q. Miller Scraper Co. also manufactured plows?

A. Yes.

Q. Consolidated Distributors also purchased a few of these plows? A. We purchased seven.

Q. Were these plows turned over to you on the Consolidated premises? A. Yes.

Q. Where were these placed?

A. Most of them were shipped directly out to various dealers throughout the United States. I believe we kept two there for a short time close to our office.

Q. As a matter of fact, at all times these few plows were kept right by your office? A. Yes.

Q. The Model A scraper is small?

A. Two yards. [18]

Q. Do you have any knowledge of the dead weight of that scraper?

A. I can't tell you exactly.

(Testimony of W. A. Reynolds.)

Q. The gross weight? Do you know the gross weight? A. About 4,270 pounds.

Q. The Model B scraper is a 3 yard scraper, is it not?

A. No, the Model B is a 6½ yard scraper.

Q. What is the gross weight of the Model B scraper? A. 13,210 pounds.

Q. Miller Model C scraper is a 3 yard scraper?

A. Yes.

Q. What is its gross weight?

A. 6,940 pounds.

Q. And the Model D scraper is a 4½ yard scraper? A. Yes.

Q. What is the weight of that scraper?

A. 8,700 pounds.

Q. Was it the 6½ yard Model B scraper that had no wheel on the front? A. No.

Q. Which one—which model had no wheel on the front?

A. A 10 yard scraper, made under special order and a 6 and a 6½ yard scraper made under special order. When they were ordered they were ordered less the front dollies.

Q. Were some of the scrapers turned over to you without front dollies?

A. Yes, the 10 cubic yard scrapers.

Q. And what is the gross weight of those 10 yard scrapers? A. 18,750 pounds.

Q. At the time you wanted to move the smaller scrapers, you would pull them with another vehicle?

A. Right.

(Testimony of W. A. Reynolds.)

Q. What kind of vehicle did you pull these scrapers with? [19] A. A jeep.

Q. A jeep is a 4-wheel traction vehicle?

A. Right.

Q. What sign, if any, was on that jeep?

A. Consolidated Distributors, Inc.

Q. Consolidated Distributors, Inc. was painted on the side of the jeep?

A. It was painted on a sign and placed on the side of the jeep.

Q. And you would use the jeep to pull small scrapers around? A. Yes. That is right.

Q. Could you pull any of the larger size scrapers with the jeep? A. No.

Q. How were the larger size scrapers moved?

A. With a large truck, we moved them with a large truck.

Q. Did you have a large truck? A. No.

Q. Did you contract for that service?

A. Yes.

Q. With whom did you contract for such service?

A. Owl Transfer and on heavy equipment Fortier Transportation.

Q. Did these people come in with heavy equipment and move whatever you wanted moved?

A. Yes.

Q. Whenever you would move this equipment onto the highway did you have to have a permit?

A. Yes.

Q. Did you ever obtain a permit to move this equipment? A. Yes.

(Testimony of W. A. Reynolds.)

Q. From what office did you obtain these permits? From the Highway Patrol Office?

A. From the office of the State Highway Patrol in Fresno, and [20] whenever the occasion occurred we had to go onto the County road with equipment, we got a permit from the County Highway Office.

Q. The main highway bounds the premises on the North side?

A. The county road is on the North side, when we wanted to use that we had to get a county permit.

Q. Then using the county road was the only direct way to Highway 99? A. Yes.

Q. And to go out on Highway 99 you would have to get a permit from the California Highway Patrol? A. Yes.

Q. Getting back to the scrapers—you have information concerning their dimensions?

A. Yes.

Q. You have the specifications before you?

A. Yes.

Q. What is the width of these various type scrapers?

A. The width of the Model A is 6 feet 11 inches. The model C is 7 feet 10 inches and the Model D is 7 feet 11 inches. The Model B is 10 feet 6 inches and the Model E, or 10 cubic yard scraper, the large one, is 10 feet 10 inches wide.

Q. That is the width of the scrapers?

A. Yes.

Q. What is the height of the various scrapers?

(Testimony of W. A. Reynolds.)

A. The Model A is 4 feet 9 inches, the Model C is 5 feet high, the Model D is 6 feet 6 inches, the Model B is 6 feet 10 inches, and the Model E is 8 feet high.

Q. All of these models are bulky, are they not?

A. Yes.

Q. All of them are substantially heavy and difficult to move, are they not? A. Yes. [21]

Q. Miller Scraper had a piece of automotive equipment on the premises, did they not?

A. Yes.

Q. This was a pick-up truck? A. Yes.

Q. Did it have Miller Scraper & Mfg. Co. painted on the side? A. Yes, I think it did.

Q. Was that pick-up ever parked in the area where the scrapers were parked? A. No.

Q. This pick-up was used for any particular purpose?

A. I could not testify as to that, definitely. I would see it out there, however, and I suppose it could have been used in making adjustments or otherwise.

Q. Did you ever see it parked by the scrapers?

A. No.

Q. Did you ever use the pick-up? A. No.

Q. You are positive on that? A. Yes.

Q. I understand some of the scrapers were taken out for demonstration purposes? A. Yes.

Q. What was the procedure on that?

A. If we need a scraper for demonstration purposes we would contact Mr. Forrest at the bank

(Testimony of W. A. Reynolds.)

and if we received his permission, we would remove the scraper for a few hours and demonstrate it and then bring it back to our lot.

Q. Did you ask permission of Miller Scraper?

A. No.

Q. You always asked permission of the bank?

A. Yes.

Q. Was Consolidated Distributors taxed for personal property tax on these scrapers? A. Yes.

Q. Did you pay the tax? A. Yes. [22]

Q. Did Consolidated Distributors procure insurance policies protecting these scrapers against fire and theft and so forth? A. Yes, we did.

Q. These policies insured both Consolidated Distributors and the Bank of America? A. Right.

Q. I will show you an insurance policy and ask you to identify it.

A. Yes—that is a Marine Insurance Co. policy.

Q. This policy is a Marine Insurance Company of New York policy, No. 406841? A. Yes.

Q. In the right hand corner is designated Consolidated Distributors, Inc. and Insurance Agency? A. Correct.

Q. Do you see the date of issuance, August 14, 1952? A. Yes.

Q. On the endorsement attached to the policy it describes the insured property as Miller Rotary Scrapers agricultural equipment for farming. Do you see that? A. Yes.

Q. These are the same rotary scrapers you testified about this morning? A. Yes.

(Testimony of W. A. Reynolds.)

Q. The same scrapers as shown on the Trust Receipts? A. Yes.

Q. Did you insure all the scrapers?

A. Yes.

Q. You insured the ones on the Trust Receipts, together with all others that were manufactured and received by you? A. Yes.

Mr. Barrett: Your Honor, can this be received in evidence next in order?

The Court: Just one document? [23]

Mr. Barrett: Just one document, your Honor, with records attached.

The Court: It will be received in evidence as Exhibit C for Consolidated Distributors. You may examine, Mr. Thompson.

Mr. Thompson: Mr. Reynolds, I believe you said Consolidated Distributors paid \$50 per month rental for the part of the office that they used?

A. Yes.

Q. Who did you pay the rent to?

A. Ray Miller or Kenneth Miller.

Q. Did you give them a check each month or transfer credits on your invoices?

A. We paid by check.

Q. What portion did you rent, what portion of the building?

A. The east office of the building.

Q. Where did the sign Consolidated Distributors, Inc. appear?

A. We had a sign on the glass of the door going into the office.

(Testimony of W. A. Reynolds.)

Q. How large was this sign?

A. About 24 by 24 inches.

Q. How large were the letters in your name?

A. About 3 inches high, in capital letters.

Q. Did you have any sign on the outside of the building?

A. We had a sign on the front of the building that said Consolidated Distributors, Inc.

Q. On the front of the office building?

A. Yes.

Q. Is the sign still there? A. No.

Q. When was it removed?

A. I can't tell you.

Q. About how long ago, can you remember?

A. Oh, since June in 1953, to my knowledge.

Q. You have never seen that sign since June, 1953? A. No.

Q. Do you know who removed it? A. No.

Q. Is the lettering still on the glass door leading to the office? A. No.

Q. When was it removed? A. I can't say.

Q. How long was it there?

A. Since June 1, 1953.

Q. In other words, since June 1, 1953 as far as you know, there has been nothing on the door or no sign on the outside indicating that Consolidated Distributors, Inc. had offices there? A. Right.

Q. There is nothing on any other part of the premises indicating that Consolidated Distributors, Inc. had any interest in the premises?

A. Right.

(Testimony of W. A. Reynolds.)

Q. Are the scrapers still in the same location that they were at the time of the bankruptcy?

A. I can't answer that.

Q. Haven't you been down there recently?

A. Yes.

Q. Did they appear to be in the same general location?

A. They have been moved from time to time to cut weeds.

Q. Do they occupy the same general portion of the premises? A. Yes. I think so.

Q. That portion of the premises is located about 150 feet south of the office building?

A. I would not say it was quite that far.

Q. Would you say these scrapers are 100 feet south of the office building? A. Probably. [25]

Q. Are there other scrapers further south in a row? A. Yes.

Q. And the last scraper is about 250 feet south of the office building? A. Yes.

Q. Between the office building and the first row of scrapers there are a few shacks, are there not?

A. No.

Q. Isn't there a garage and some type of shed there? A. There is the paint building.

Q. Aren't there a few other items there—a few trailers located between the scrapers and the buildings?

A. I don't believe so. There is a loading hoist.

Q. Are there not some feed wagons located there? Between the scrapers and the paint shed?

(Testimony of W. A. Reynolds.)

A. No.

Q. I will show you this picture and ask you whether or not it indicates what was in between the scrapers and the paint shed that you refer to.

Objection by Mr. Barrett. Objection overruled.

Q. I am referring to the items that were on the premises at the time the bankrupt was adjudicated.

A. I could not honestly testify because I did not inspect the premises at that time.

Q. Is it your testimony that you don't know where the scrapers were located at the time Miller Scraper Co. was adjudicated a bankrupt?

A. Yes.

Q. You will testify as to the location of the scrapers as of June, 1953? A. Yes.

Q. But not as to their location since that time.

A. No. [26]

Q. Now, Consolidated Distributors had no lease on any other part of the premises other than their portion of the office?

A. Just what is designated in our contract with Miller Scraper.

Q. In other words, you are referring to the portion of your contract authorizing you to have a storage yard on the Miller premises—paragraph 3 of the agreement? A. That is right.

Q. In other words, all your testimony refers to the period prior to June, 1953? A. Right.

Q. You have no knowledge of the situation physically, or otherwise at the plant?

A. I don't understand. I was not at Consoli-

(Testimony of W. A. Reynolds.)

dated Distributors until December. My son or Mr. Axman or some other employee made the inspection at the factory and as to the physical location of the equipment which was inspected.

Q. As I understand it, you don't know where this equipment was located after June, 1953? You don't know on what particular portion of the ground, the one-fourth acre, these scrapers were located. You don't know whether there were one or two lines of scrapers, or whether they were back of the building or on the east side—just that they were on the ground. You don't know where they were located or what else was located on the ground at the time Miller Scraper was adjudicated bankrupt?

Mr. Barrett: What was that date?

The Court: I don't know what line of demarcation is being drawn—the case was filed on August 2, 1954.

Mr. Bechtel: Usually the adjudication order is made on the same day. [27]

Mr. Barrett: It seems to me that there is no significance in the date of filing or in the date of the adjudication.

The Court: Except with relation to testimony.

Mr. Barrett: Section 3440 of the Civil Code as to delivery is the sole thing that we are concerned with.

Mr. Thompson: You don't know where the scrapers were located or what else was there on the premises as of August 2, 1954? A. No.

(Testimony of W. A. Reynolds.)

Q. You don't know where they were located or anything else there was located at any other time during 1954? A. No.

Q. You state that sometimes these scrapers were brought out to your storage yard and stored and sometimes they were in a defective condition?

A. Yes.

Q. And you did not accept delivery of the scrapers if they were in a defective condition?

A. We refused them.

Q. And usually Miller would send out a new one to replace the defective one until it could be repaired? A. Yes, if the defect was minor.

Q. If the defect was minor, and the repair was made, you accepted the scraper? A. Yes.

Q. How many days did it take to make minor repairs?

A. That is hard to say. If we discovered that some of the working parts on a scraper were unacceptable, we would ask them to replace these parts and this was done immediately and then we would accept the scrapers. If it was more serious, the scrapers were pulled off the yard and returned to the factory [28] and this took more time. Sometimes if parts were defective and had to be sent for, replacements had to be sent for, then it took more time. But minor repairs could be made immediately.

Q. How many days elapsed on the average in making minor repairs? A. I don't understand.

(Testimony of W. A. Reynolds.)

Q. You said most minor repairs could be made in a short time.

A. I said most minor repairs could be made on the spot.

Q. How long a time usually elapsed between the time you discovered defects and asked for repairs and repairs were actually made?

A. A few hours.

Q. Did you always discover the defects immediately, or sometimes a week or two later?

A. We did not discover some until after they were put in the field.

Q. And you discovered some defects after they had been sitting in the yard a few days?

A. Yes.

Q. And you would have them come out and take care of the repairs? A. Yes.

Q. So, on some occasions repairs would be made several days after delivery? A. Yes.

Q. And these repairs were made immediately?

A. Anything of a minor nature that could have been attended to was attended to there, on the spot.

Q. Is it true that on the main building of the yard the name Miller Scraper & Mfg. Co. appeared in lettering 3 or feet high? A. Yes. [29]

Q. And that name appeared on the north and east sides and on the top of the building?

A. Yes.

Q. Therefore, anyone driving onto the premises, the only name that he could see would be Miller Scraper & Mfg. Co.? The only name that was visi-

(Testimony of W. A. Reynolds.)

ble to any person driving into the premises was the name Miller Scraper & Mfg. Co.? Is that right?

Objection by Mr. Barrett—Overruled.

A. If a person was looking for the Miller factory, that would be the sign he would see. Miller has his factory well lettered.

Q. Miller had these large signs even before June, 1953 when you said you had small lettering on the door of your office in the building on the northeast corner of the premises? A. Yes.

Q. Now these scrapers, they could be hooked onto a truck or tractor and pulled down the highway on inflated tires?

A. Yes. Except the large scraper, the 10½ yard scraper.

Q. The 10½ cubic yard scraper required a special conveyance? A. Yes.

Q. But it could be pulled down the road?

A. Yes.

Q. When the tires went flat on the scrapers you pumped them up?

A. When they would go flat we would immediately ask the factory to inspect them and make adjustments.

Q. Aren't there quite a few scrapers out there with flat tires now that have been flat a long time?

A. No, I did not notice any.

Mr. Bechtel: You say you didn't notice any flat tires—are you referring to your visit of yesterday?

A. I was unable to see any tires that were flat yesterday.

(Testimony of W. A. Reynolds.)

Mr. Thompson: I believe that is all.

Mr. Barrett: With respect to the signs, you testified you and Miller Scraper shared the same building for offices? A. Yes.

Q. On the outside of this office building there were lettered signs which contained both your name and Miller Scraper & Mfg. Co.? A. Yes.

Q. Were these signs both the same size?

A. I believe they were.

Q. They were both located over the front entry?

A. Yes.

Q. They, both you and Miller, had signs on the inside of the offices, over the doorway, that was visible only from the waiting room? A. Yes.

Q. And on the outside the names of both companies were equally visible? A. Right.

Q. Miller Scraper & Mfg. Co. and Consolidated Distributors, Inc. occupied the same size office space? A. Yes.

Q. A person who had business with the management of Miller Scraper came through this front doorway of the office building to see their office manager? A. Yes.

Q. And, similarly, anyone who had business with you came through that same door? A. Right.

Q. And office business was distinct from factory business? A. Yes.

Q. Under the terms of your agreement with Miller Scraper they guaranteed their articles to be free from imperfections? A. Yes. [31]

(Testimony of W. A. Reynolds.)

Q. They guaranteed the full article—workmanship and materials?

A. Yes. I think that would be true in any organization.

Q. You left the premises on or about June of last year? A. Yes.

Q. And you have been back since, periodically?

A. Right.

Q. And all of the articles with which we are concerned here were delivered before you left?

A. Yes.

Could I correct that? They were made before September 1st of 1953, at least.

Q. Who was there to inspect them in your absence?

A. My son or one of the other employees.

Q. And all the time you were there you paid rent to Ray Miller? A. Usually.

Q. He was vice-president and office manager?

A. Yes.

Mr. Barrett: That is all.

Mr. Bechtel: Mr. Reynolds, I will show you the Trust Receipts which are in evidence on behalf of Bank of America, Numbers A to E inclusive. On the bottom of these Trust Receipts appear various dates from January 5, 1953 to May 2, 1953. These are the dates, are they not, that the scrapers were delivered to Consolidated Distributors?

A. Yes. They were usually delivered the day the invoice was received.

Q. It would be true then that the scrapers de-

(Testimony of W. A. Reynolds.)

scribed in these Trust Receipts were delivered to Consolidated Distributors subsequent to the last date appearing thereon or the 2nd of May, [32] 1953? A. Right.

Mr. Thompson: I want to show you, Mr. Reynolds, this picture. Imagine you are standing just south of the main building, looking south. Does that show the scrapers as they are now located down there?

A. They are in that general vicinity, maybe a little further toward Manning Avenue. It is hard to judge from the position we are standing in. They could be in that near vicinity.

Q. Then you don't know exactly where they are located? A. No. Not exactly.

The Court: You say you paid \$50 a month rent for the office? A. Yes.

Q. Did Consolidated Distributors, Inc. pay Miller Scraper and Mfg. Co. any other rent at all?

A. No, sir. We had an understanding in our contract. It was part of our agreement.

Q. As I understand it, you testified that these scrapers are stored in a lot which lot runs more or less generally north and south, extending about 150 feet north of the office and approximately 250 feet south of the office? A. Yes.

Q. And the lot on which these scrapers is stored is about 100 feet wide? A. Yes.

Q. Are there any other articles stored in the vicinity of these scrapers now? A. No.

Q. Was there any other articles stored there in June?

(Testimony of W. A. Reynolds.)

A. Our scrapers were kept separate from anything that Miller owned. [33]

Q. Were all of the scrapers involved on those invoices stored in that lot?

A. All, except sometimes 1 or 2. When we had a new scraper we would sometimes set it up near our office on a show floor. We made some improvements where we could set up a scraper right at the side of our office or around the front so that we could display them.

Q. I was out at the premises a day or two after the petition was filed. There was a row of scrapers lined up near the highway, and then another row of equipment and various types of implements. The factory yard was just to the south, if Manning Avenue runs east and west.

A. It is to the south of the building and south of our scrapers.

Q. How about to the west of your row of scrapers?

A. That would take you to the paint shop, a little space where paints and so forth are stored. We kept our scrapers clear to the back of the lot and south as far as we could.

Q. Which direction was the lot from the office?

A. To the east.

Q. That would be 250 or 300 feet from the office?

A. Yes.

Mr. Thompson: The witness apparently assumes that Highway 99 runs east and west.

Mr. Reynolds: I am judging from Manning

(Testimony of W. A. Reynolds.)

Avenue. When the scrapers were re-arranged from time to time because the bank asked us to keep them in shape and send our inventory in when [34] we sold scrapers and I would have to move them from one place to another. When we sold scrapers we would have to move other scrapers to straighten the line. We would have to get the line back together.

(Noon recess was called at 12:10 p.m.) [35]

The above-entitled matter came on regularly for continued hearing on the 14th day of October, 1954, commencing at the hour of 1:30.

Mr. Thompson: If the Court please, to save time and so that the future witnesses can refer to these pictures, if they wish I would like to offer them into evidence, the pictures which I took, about, say two and four weeks after August 2, 1954. This group which I want to offer as a group was taken from a point on the railroad track about, I would say, about half way down the property and was taken first facing towards the southernmost portion of the property, and the next picture was taken of the area further north to take in all of the property and I would like to number them accordingly number one, two, three, four, five, and six.

The Referee: This is the first group that the Trustee has [1]* introduced in evidence. Any other evidence?

Mr. Thompson: No, sir.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

The Referee: They will be received in evidence as exhibits one, two, three, four, five, and six each for identification only. Any objection?

Mr. Barrett: We have no objection to the exhibits being received for identification and so marked.

Mr. Bechtel: I have no objection to their being so marked.

Mr. Thompson: Maybe they can be one-A, one-B, and one-C, and these other pictures can be two and three because they are all panorama in sequence.

The Referee: They have been received and I have already entered them as one, two, three, four, five, and six.

Mr. Thompson: I have a picture here which was taken from approximately the corner of Manning Avenue and the railroad track facing southeast towards the plant which I would like to offer as a Trustee's Exhibit for identification number seven, and I have a picture which was taken from the inside of the manufacturing plant, in other words, east of the wing that runs north and south, and south of the wing that runs east and west and taken from an elevation of about nine or ten feet facing south by southeast towards the scrapers which are located on the premises. I would like to offer it as Trustee's Exhibit Number Eight for identification.

Mr. Barrett: What date was it that you took the pictures?

Mr. Thompson: Well, it was, the date was about two to four weeks [2] after August the 2nd.

Mr. Barrett: Of this year, and you took the pictures yourself?

Mr. Thompson: I took the pictures myself.

The Referee: The photograph offered as Exhibit Seven will be received as Trustee's Exhibit Seven for identification only and the photograph offered as Trustee's Exhibit Eight for identification only will be so received.

Mr. Barrett: Shall I call the next witness, your Honor?

The Referee: Yes.

Mr. Barrett: Mr. James Reynolds, please.

JAMES REYNOLDS

Being first duly sworn, testified as follows:

Mr. Barrett: Will you state your full name, sir?

A. James R. Reynolds.

Q. And you are residing in Fresno?

A. Yes, sir.

Q. And what is your address?

A. 1829 Harvard.

Q. In 1952 were you employed by the Consolidated Distributors, Inc.?

A. Yes, sir, in the latter half of 1952.

Q. You were working there with your father in the office, weren't you? A. Yes, sir.

Q. Calling your attention first to the office. This office that was occupied by Consolidated Distributors Inc., was a wing of it also occupied by Miller Scraper Manufacturing Company?

A. Yes, sir. [3]

Q. On the outside, on the front of this building,

(Testimony of James Reynolds.)

on the Manning Avenue side, was a little porch, wasn't there? A. Yes, sir.

Q. And on it leading into the front door do you recall a sign? A. Yes, sir.

Q. And what does that sign say?

A. It says the offices of the Consolidated Distributors Inc. and the Miller Scraper and Manufacturing Company.

Q. And that was visible?

A. Yes, sir, it was a printed sign.

Q. Did the two companies occupy respective wings of the building in which they were tenants, is that correct?

A. Yes, sir, separate wings.

Q. And your father was in charge of the office of the Consolidated, is that true? A. Yes, sir.

Q. And what was your capacity there?

A. I was his assistant.

Q. And, you too, occupied it during business hours? A. Yes, sir.

Q. And whatever you were called upon to do for Consolidated you did in those offices?

A. Yes, sir, it was conducted in those offices.

Q. I will show you on behalf of the Bank of America these five documents, is that your signature, James R. Reynolds? A. Yes, sir.

Q. And at the bottom of each of these exhibits?

A. Yes, sir, it is.

Q. Just for point of reference in the record, these are Exhibits A, B, C, D, and F of the Bank of America in these proceedings. Now, Mr. Reyn-

(Testimony of James Reynolds.)

olds, the Consolidated Distributors Inc., and Miller Scraper and Manufacturing Company have an agreement in writing between them governing their relationship during that period of time, is that correct?

A. Yes, sir.

Q. Under which agreement the Miller Scraper and Manufacturing Company—

Mr. Thompson: I object to that as leading and suggestive and asking for the conclusion of the witness.

Mr. Barrett: I will withdraw it.

Mr. Thompson: The written document speaks for itself.

Q. (By Mr. Barrett): There is a paint shed back there, isn't there? A. Yes, sir.

Q. With respect to the location of the office and the location of the manufacturing plant itself, where is this paint shed?

A. It is approximately to the southwest of the office building and to the east and south of the manufacturing plant.

Q. It is approximately equidistant between the two, isn't it?

A. Approximately, yes sir.

Q. And the scrapers were some distance in a southerly direction from it? A. Yes, sir.

Q. And the last action was painting in the shed, wasn't it? [5]

A. Yes, sir, the scrapers were stored there until they were pulled from the paint shop.

(Testimony of James Reynolds.)

Q. And, then what happened to them?

A. They were pulled out of the paint shop to an area where they were stored for shipment.

Q. Will you describe to us the location of this storage area of which you speak?

A. The storage area was south of the office building and to the east of the paint shop, lying almost on the easterly side of the property line.

Q. And then Miller Scraper and Manufacturing Company personnel pulled the scrapers out of the paint shop into the storage area?

A. Yes, sir.

Q. What did they use for that purpose?

A. A tractor.

Q. And in what manner did they arrange these scrapers?

A. They were arranged according to their size and according to their model.

Q. In other words, the Miller Scraper and Manufacturing Company manufactured scrapers of different sizes, did they not?

A. Yes, sir.

Q. Designated by different letters and model numbers and they were arranged, of course, according to the grouping of sizes?

A. Yes, sir.

Q. And were they arranged in rows?

A. Yes, sir. They were arranged in rows.

Q. Now, did Miller Scraper and Manufacturing Company put any [6] other equipment in this storage area?

A. No, not within that immediate area.

Q. None of their own equipment of any kind went into that area, is that not true?

(Testimony of James Reynolds.)

A. Yes, sir, it is true.

Q. Now, with respect to the storage area, approximately how large is it?

A. Approximately one acre.

Q. Do you know how large, approximately, the entire premises are? A. Four acres.

Q. Were these scrapers moved from time to time and, if so, for what purpose and in what manner?

A. They were relined in their size groupings. As the units were moved for shipment they were moved out so that the weeds can be kept down as they grew up around the machines.

Q. So their groupings would be rearranged in there from time to time? A. Yes, sir.

Q. Who did that work?

A. As a rule it was done by Mr. Miller's men on his tractors.

Q. Will you state what happened at the time these scrapers would be pulled out individually from the shed in which they were painted, and parked in the storage area? What happened from that point on?

A. They were inspected and the serial numbers recorded and checked.

Q. Did you do that work? A. Yes, sir.

Q. As well as the others in your organization?

A. Yes, sir.

Q. Now, with respect to what you did with those documents [7] that we previously identified as Trust Receipts, did you check the scrapers listed

(Testimony of James Reynolds.)

on those Trust Receipts? A. Yes, sir.

Q. They are inspected and signed by you, is that correct? A. Yes, sir.

Q. Did you check the identifying marks and put it on those documents? A. Yes, sir.

Q. Would you look at those documents, please, did you fill out that document? A. Yes, sir.

Q. And then you will notice attached to each one of the exhibits previously mentioned as being Trust Receipts, there is an invoice, is there not?

A. Yes, sir.

Q. From the Miller Scraper and Manufacturing Company? A. Yes, sir.

Q. Would you tell us in what manner those invoices were received?

A. They were received by us on the 15th, the 1st and the 15th of each month, based upon the production in that period of time.

Q. They contain a summary, do they not, of the merchandise that was pulled out of that shed into the storage yard in the interim? A. Yes, sir.

Q. And were they by you or by anyone in your direction—— A. Yes, sir.

Q. Attached to the Trust Receipts itself?

A. Yes, sir.

Q. And then what did you do with those documents? [8]

A. I took the Trust Receipts and the invoices from the Miller Scraper and Manufacturing Company to the Bank of America, the Selma Branch Bank.

(Testimony of James Reynolds.)

Q. You did that personally in most cases?

A. Yes, sir.

Q. Specifically, with respect to each of the documents you have before you, being Exhibits A through E for the Bank of America, did you specifically take those documents to Mr. Forrest of the Bank of America?

A. To the best of my knowledge, yes, sir.

Q. And what happened when you took them to the bank?

A. They were processed according to the agreement which we had with the bank.

Q. Would you tell us what happened to them?

A. Ninety percent of the invoices or the amount of the trust receipts were credited to Miller's account, and, of course, we were responsible for the liability of it.

Q. Now, Miller Scraper and Manufacturing Company had their bank account at that bank, did they not?

A. Yes, sir.

Q. And the bank would take the proceeds of the trust receipts and put it in the Miller bank account, is that your testimony?

A. Yes, sir.

Q. Has all of the money, the list price for all of the scrapers listed in those trust receipts, been paid by the Bank of America to Miller, to your knowledge?

A. Yes, sir.

Q. So that all of those articles, the scrapers, have been [9] completely paid for, have they not?

A. Yes, sir.

Q. Now, thereafter when you wished to move one

(Testimony of James Reynolds.)

of those articles other than for a cash sale, did you obtain permission from Miller?

Mr. Thompson: I object, your Honor, on the grounds it is misleading.

Mr. Barrett: I don't think so because that is preliminary.

The Referee: I think the objection is good.

Mr. Barrett: All right, supposing you wanted to move one of those scrapers for other than a cash sale price, what procedure would you go through?

A. We had to get permission from the Bank of America, particularly, from Mr. Forrest, the manager of the Selma Branch, to remove them from the premises where they were stored under the Trust Receipts.

Q. Did you at any time obtain permission from anyone else? A. No, sir.

Q. From any other persons, firms, or corporations? A. No, sir.

Q. Did you ever ask permission from Miller to ever do so? A. No, sir.

Q. Did anyone from Miller Scraper and Manufacturing Company, as its servant or otherwise, ever claim any right to exercise——

Mr. Thompson: I object to his question as leading and suggestive and calling for the conclusion of the witness.

Mr. Barrett: All right, I will withdraw my question.

Q. Did Miller have any contact with those [10] machines after they were left on the lot?

(Testimony of James Reynolds.)

A. On some occasions, yes, sir.

Q. Just what contact would Miller's organization have?

A. Well, after they were left on the lot, in the event there was a defect which became noticeable or which was found during the inspection of the machine, of course, they fixed them, and there were some occasions when they were repaired right on the lot.

Q. At the time they were received on the lot, were they inspected? A. Yes, sir.

Q. What was the procedure in case something was found wrong with them at that time?

A. The proper procedure was that they were asked to repair them, and the scrapers—the scrapers were not received for payment until they were rectified.

Q. Did you at anytime obtain payment on the scraper before the defect was remedied?

A. No, not knowingly.

Q. Do you recall any instances in which Miller fixed any part of those scrapers—mechanical imperfections—after the bank had paid over the funds? A. Yes, sir.

Q. How many at this time would you say?

A. Very rarely, I couldn't give any number.

Q. What was the circumstance in the cases that would arise?

A. At one time a tire went down, or a tire was found to have a leak caused when it was mounted

(Testimony of James Reynolds.)

which didn't show up for several days after the scraper was set on the lot, which was repaired.

Q. Was there any rusting during foul weather?

A. Yes, sir.

Q. Was that ever checked by the Miller people?

A. Yes, sir.

Q. To what extent did this kind of repair involve repair equipment, in what manner would Miller repair these things, by manual labor, or what?

A. Yes, sir, manual labor.

Q. Miller had some automotive equipment, didn't he?

A. Yes, sir.

Q. Owned by the corporation?

A. Yes, sir.

Q. It was a corporation at that time, wasn't it?

A. I don't know.

Q. Did Miller have a pick-up truck with his name on it?

A. Yes, sir.

Q. Was that pick-up truck ever used in this parking area or storage area?

A. Not for a sustained length of time, no, sir.

Q. What was the nature of the ground in this area, very loose, sandy?

A. Yes, sir, very loose and sandy.

Q. Did you ever see Miller's truck parked there for any considerable length of time?

A. No, sir.

Q. Did you ever know of any instance when it was left there overnight by some employee of Miller's organization?

A. Not that I recall.

Q. The Consolidated Distributors Incorporated had a jeep, didn't they?

A. Yes, sir.

(Testimony of James Reynolds.)

Q. Would you describe that jeep and any lettering on it, if any? [12]

A. Well, the jeep was painted orange and there was a tin sign attached to it with Consolidated Distributors Inc. painted on it with our address and telephone number.

Q. About what height were the letters on that sign—"Consolidated Distributors Inc."?

A. "Consolidated Distributors Inc.", I would say approximately six inches.

Q. To what degree was this jeep used in the storage area?

A. Well, it was left in the storage area when it wasn't being used for demonstration purposes.

Q. You speak of demonstration purposes, was it being used to pull out one of those scrapers?

A. Yes, sir.

Q. What size scraper? A. Model A2.

Q. Now, with respect to other equipment manufactured by Miller, was any other equipment of any other kind or nature stored in this area?

A. No, sir.

Q. Some time after this contract relationship between Miller Scraper and Manufacturing Company and Consolidated Distributors Inc. came to an end Miller began to market his products himself, didn't he? A. Yes, sir.

Q. About what time, was that—month and year?

A. I think it began in September 1953, and the final termination, the legal termination, was December.

(Testimony of James Reynolds.)

Q. Now, Miller manufactured a very small volume of scrapers in that period of time, didn't he?

A. As far as I know, yes, sir. [13]

Q. With respect to what happened to those scrapers, were any of Miller's scrapers, any of his products, ever situated on the storage lot?

Mr. Thompson: Well, I object just to the form of the question because it calls for the opinion and conclusion of the witness on this storage lot. There is no evidence that this property is segregated from any other property that belonged to Mr. Miller.

Mr. Barrett: Well, Counsel is simply arguing the legal effect of the language used by the witness. Now, that is for the Court to decide.

Mr. Thompson: The Counsel refers to this storage lot——

Mr. Barrett: I am using the language of the witness and of the agreement.

Mr. Thompson: As to the separate storage lot, there is no segregation in any way or otherwise segregated from the rest of it.

The Referee: Objection overruled.

Mr. Barrett: Just for the record—in this agreement there is a storage space which was bargained for, and these witnesses in fact used it for that purpose. Do you have the question in mind now?

Mr. Reynolds: I would like to have the original question repeated.

Mr. Barrett: May I reask the question?

The Referee: Yes.

Q. (By Mr. Barrett): When Miller produced

(Testimony of James Reynolds.)

scrapers for his own account, [14] where were those scrapers located on the premises?

A. As far as I know they were located adjacent to the manufacturing building.

Q. There is a triangular piece in front of the Miller plant? A. Yes, sir.

Q. Did Miller, to your knowledge, store anything there?

A. Yes, sir. Scrapers were stored there.

Q. Yours? A. No, sir.

Q. Were any referred to in your testimony stored there? A. Not to my knowledge.

Q. You have never seen them there?

A. No, sir.

Q. Now, we received notice that bankruptcy was filed some time in 1954, what were on the premises at that time?

A. I don't know, I did not visit the premises at that time.

Q. All of the scrapers that were covered by the Trust Receipts, and which are claimed as the property of Consolidated Distributors Inc. by the bank, were delivered prior to July of 1953?

Mr. Thompson: I object to his question as leading and suggestive and calling for the conclusion of the witness with the word "delivered".

Mr. Barrett: All right, strike it.

Q. Let's say, "left" in the parking area to which you have referred in your testimony?

A. Yes, sir.

Q. Is that correct? A. Yes, sir. [15]

(Testimony of James Reynolds.)

Q. So that all of them were there while you were there on the premises, and you saw what happened and what took place, is that correct?

A. Yes, sir.

Q. Now, what has been done with them, and by whom, since then? A. I don't know.

Q. You are not qualified to state because you don't know, you have not been there, is that correct?

A. That is correct.

Q. Now referring to these scrapers, you have heard your father's testimony this morning?

A. Yes, sir.

Q. If I ask you the same questions, would you answer them the same way with respect to the weight and so forth? A. Yes.

Q. You saw your father referred to the specifications in writing? A. Yes, sir.

Q. And so I do not need take time to repeat the same questions? A. Yes, sir.

Q. Now, with respect to moving this equipment, when it was necessary to move the two-yard scrapers, what techniques were employed?

A. A truck was leased or hired for that purpose.

Q. And would the truck pull the scrapers?

A. Yes.

Q. And in the case of some of the larger types, was it necessary to load them into a trailer, were they all mobile enough to be pulled? A. Yes.

Q. Some of those scrapers had no front dollies, did they? A. That is correct. [16]

(Testimony of James Reynolds.)

Q. How would those types be removed?

A. By special trucking equipment.

Q. Would you describe the size of that equipment that was you say, "special", can you give us, as laymen, can you give us the size, the approximate size to move it?

A. Well, it would require a hoist or some sort of a boom which would be capable of handling eighteen thousand pounds of weight, and there are very few pieces of trucking equipment in the area which can handle such a machine as that.

Q. Now, Consolidated Distributors Inc. had no automotive equipment on the premises other than the jeep, is that correct? A. That is correct.

Q. When these articles had to be moved about you hired Owl Transfer, or some comparable transfer company to move them? A. Yes, sir.

Q. Who paid for that moving?

A. Consolidated Distributors Inc.

Q. Did Miller Scraper and Manufacturing Company or Corporation pay for that moving about?

A. No, sir.

Q. Where was this jeep to which you referred in your testimony, parked at night?

A. If it was attached to the demonstrating scraper, it was either parked out by the rest of the scrapers or out adjoining the east side of the office.

Q. And it was parked there customarily at night, other than during business hours, is that correct?

A. Yes, sir.

Q. That is all the questions for now.

(Testimony of James Reynolds.)

Q. (By Mr. Thompson): Have you, has Consolidated Distributors Inc., purchased any scrapers from Miller Scraper and Manufacturing Company since June of 1953? A. Not to my knowledge.

Q. And was the sign removed from the office door in front of the office in June of 1953, that is, the Consolidated Distributors Inc. sign?

A. It was removed after the month of June, 1953.

Q. How long after the month of June?

A. It was within thirty days.

Q. So all outward signs of Consolidated Distributors Inc. ever having been on the premises of Miller Scraper and Manufacturing Corporation were removed by July of 1953, is that right?

A. Yes, sir, all printed signs.

Q. Were there any other signs on the premises after July of 1953?

A. Yes, sir, our property, our merchandise.

Q. You mean there were some scrapers on the premises? A. Yes, sir.

Q. There was nothing then after July, 1953, that would indicate to anyone that Consolidated Distributors Inc. had any interest on the property after July, 1953, was there?

Mr. Barrett: Just a moment, I will have to object to that as calling for the opinion and the conclusion of the witness.

The Referee: Would indicate that they had any interest on the property? [18]

Mr. Thompson: Yes, by signs or otherwise.

(Testimony of James Reynolds.)

Q. Was there any way—I will withdraw that question. Did the name of Consolidated Distributors Inc. appear on the premises of Miller in any form after July of 1953?

A. Yes, on our demonstrator unit and on our jeep which was described.

Q. Was that parked there after July, 1953?

A. Yes, sir.

Q. Where?

A. With the rest of the scrapers.

Q. And the only place was on the jeep?

A. And on the demonstrator unit.

Q. Yes, and no place else? A. No, sir.

Q. And was there any member of Consolidated Distributors Inc. present on the premises after July, 1953? A. Yes, sir.

Q. Who? A. Myself.

Q. How many times a week, how many days did you spend there after July of 1953?

A. I would say I was on the premises on the average of three times a week.

Q. For how long? A. It varied.

Q. On an average, how many hours a week?

A. Probably fifteen or sixteen hours.

Q. Now, if someone would come during your absence and want a scraper, would some Miller employee show them the scrapers that were there?

A. Perhaps.

Q. And was that a regular practice, the arrangement you had with Miller to show them the scrapers whenever Consolidated [19] Distributors Inc. was

(Testimony of James Reynolds.)

not present? A. Yes, sir.

Q. In other words, ever since you entered into this agreement between Miller Scraper and Manufacturing Company and the Consolidated Distributors Inc., it was understood, I take it, between you and Miller Scraper Company, or if you weren't there, or if some other representative wasn't present, some employee of Miller Scraper would go out and show it to them?

A. No, there wasn't any demonstration involved.

Q. They would show the scrapers to them?

A. Yes, perhaps point out some of the engineering features.

Q. Or perhaps would it be in the course of good business for both of the parties involved, if they wanted to buy a scraper, they would take an order, would they not? A. No, sir.

Q. When was the last time that you regularly appeared or spent time at the premises?

A. November, 1953.

Q. And is that the last time anyone from Consolidated Distributors Inc. spent any time on the premises? A. No, sir.

Q. When was the last time anybody was working there?

A. I don't know. I haven't been employed by them since that time.

Q. Your agreement with the Miller Scraper and Manufacturing Company ended in December, terminated in December, 1953, to the best of my knowledge.

(Testimony of James Reynolds.)

The Court: I am a little bit confused on that point. I had June in mind. [20]

Mr. Barrett: It was in December, your Honor, that the agreement was ended officially. The production for all intent and purposes ended about June.

The Referee: They moved out of the office building about June?

Mr. Thompson: As I understand it, the signs were moved shortly after June or within thirty days after the first of June or thereabouts, and no further scrapers were purchased after that? Answer the question. A. Yes, sir.

Q. But you did come there two or three times a week and spent some time there after June until November? A. Yes, sir.

Q. Since December of 1953 has Consolidated Distributors Inc. ever made a demand upon Miller Scraper and Manufacturing Corporation for any of these scrapers?

A. I have not been employed by them since that time.

Q. Well, since June?

A. The scrapers in question?

Q. Yes.

A. Yes, we have shipped scrapers since June of 1953.

Q. When was the last scraper that you shipped?

A. I couldn't answer that question.

Q. It was in 1953?

(Testimony of James Reynolds.)

A. The last one that I had anything to do with was in 1953.

Q. Do you know of any since 1953?

A. No, sir.

Q. Now, you say scrapers have been removed to clean out weeds?

A. Yes, sir. [21]

Q. And Miller Scraper and Manufacturing Corporation would do that with their trucks?

A. Usually a tractor.

Q. And did they make any charge for that?

A. No, sir.

Q. Now, these scrapers would be produced, and, I would presume, come out of the paint shop at various times, would they not?

A. Yes, sir.

Q. And the employees immediately would move them over to the yard and park them?

A. Yes, sir.

Q. And they wouldn't stop their work and wash their hands and say, "We have got a scraper for you, and come down and get it," would they?

A. No, sir.

Q. They would just park it and later on you would go down to look at it?

A. Yes, sir.

Q. And isn't it true that several days would lapse before you would get around to checking the serial numbers?

A. No.

Q. Now, you received invoices twice a month, is that right?

A. Yes, sir.

Q. You are billed for the scrapers twice a month?

A. Yes, sir.

Q. Now, isn't it true that there was property

(Testimony of James Reynolds.)

belonging to Miller parked both south of your scrapers and north of your scrapers?

A. Yes, sir.

Q. In other words, down at the southern end of the scrapers, Mr. Miller had some dusting or spraying equipment parked there, did he not? [22]

A. On the south end?

Q. Yes.

A. As far as I know, there was just junk.

Q. Well, there was some on the property?

A. Yes, sir.

Q. And just north of your scrapers, and in between your scrapers and the paint shop, Miller Scraper and Manufacturing Company had some of these feed wagons parked, did he not?

A. They were parked between the paint shop and our office, and between the manufacturing plant and our plant and our office.

Q. And were they not also parked between the paint shop and your scrapers?

A. Now, there were some parked south of the scrapers.

Q. And isn't it true immediately west of your scrapers there was property belonging to Miller Scraper and Manufacturing Corporation?

A. Immediately west, you mean?

Q. Yes.

A. I would say that they were within twenty-five or thirty feet, yes.

Q. Yes, and there were no signs between the Miller Scraper Company property, and the scrap-

(Testimony of James Reynolds.)

ers, stating that this property belongs to Miller Scraper Company and this property belongs to Consolidated Distributors Inc.? A. No, sir.

Q. There were no signs whatsoever that would indicate who owned that property, was there?

A. No.

Q. So that if you were walking down from the paint shop, past the scrapers, and down to the feed wagons, there would be no signs to indicate as to who owned any of this property?

Mr. Barrett: I will object to that as leading and [23] suggestive and asking for the conclusion of the witness. He is asking a hypothetical question.

The Referee: No signs indicating ownership is what he is asking.

Mr. Barrett: I am objecting to the form of the question. He said, "If you do this——"

Mr. Thompson: I asked, "If you had walked when you were there down from the paint shop, down to these feed wagons, could you see, or were there any signs to see who the property belonged to".

The Referee: The question has been rephrased.

Mr. Barrett: I will still object to that question. Certainly as far as this witness is concerned it is calling for his conclusion.

The Referee: It may be calling for the conclusion of the witness, but as to whether or not there were any printed or any type of signs.

Mr. Barrett: I have no objection if it is understood in that light.

(Testimony of James Reynolds.)

The Referee: The question has been rephrased, and the objection is overruled.

Q. (By Mr. Thompson): In other words, isn't it a situation where there was line on the property there where there were scrapers, and there were feed wagons, and there were miscellaneous junk, and miscellaneous property located between it, just south of the paint shop, isn't that right?

A. Between the paint shop and the property line, south property line? [24]

Q. Yes, and there were no signs to indicate who owned any of this property?

Mr. Barrett: You mean lettered signs?

Mr. Thompson: A sign is a sign. I am talking about a sign with their names on it.

Mr. Barrett: Counsel, in your previous question you have defined signs as being indicia of ownership, as I recall it.

Mr. Thompson: The word "Consolidated" did not appear on any of this property, did it?

A. No.

Q. Now, I will show you Trustee's Exhibit Number Three for Identification, and ask you whether or not this building located in the extreme left of this exhibit is not the paint shop? A. Yes, sir.

Q. And in between them the paint shop and these tractors, isn't it true that there are located several feed trailers?

A. Well, this is on the very extreme side of the property, I believe.

Q. You understand this is the paint shop on

(Testimony of James Reynolds.)

the left side of the picture and the right-hand side is south of the paint shop?

Mr. Barrett: I wish to object to this as being improper cross examination, because if I were the witness here I would be at a loss as to what this picture shows because it is in no way related to his testimony. So, I object to this question as being improper cross examination.

The Referee: You asked about the location of the scrapers. And the feed wagons, also, as I recall the cross examination, are [25] indicated by the photographs.

Mr. Barrett: So, if I accept this picture which was taken three or four weeks after the bankruptcy, what does the picture prove?

The Referee: It may not prove anything if it does not show some feed wagons in it.

Mr. Bechtel: Wouldn't the picture speak for itself?

The Referee: It may be, but I think the witness can identify it.

Mr. Thompson: The picture is not in evidence.

Mr. Barrett: I will withdraw the objection.

Q. (By Mr. Thompson): Those are the feed wagons that you were referring to, and is it not true that those feed wagons were located there when you were on the premises?

A. No, they were not.

Q. Do you know where they were located?

A. I don't know.

Q. I will show you Trustee's Exhibit Number

(Testimony of James Reynolds.)

Eight for Identification, and ask you whether or not you can identify the property which is located on the extreme left portion of that just to the extreme left of the scrapers?

A. Yes, those are feed wagons.

Q. And you don't know whether or not they were there when you were last on the premises?

A. I know that they weren't there.

Q. (By Mr. Bechtel): You know they weren't there——

Q. (By Mr. Thompson): Do you believe that those feed wagons and [26] similar feed wagons are just to the south of the scrapers, is that right?

A. Yes, sir.

Q. I will show you Trustee's Exhibit Six for Identification, and ask you whether or not you recognize these, apparently spray rigs, at the extreme right in that picture?

A. I presume that is what they are.

Q. Were they parked in that location when you were last on the premises?

A. No, sir.

Q. When was the last time you were there?

A. November of 1953.

Q. You haven't been there since?

A. No, sir.

Q. Not within the last few days or weeks?

A. No, sir.

Q. Have you driven by there?

A. Yes, sir.

Q. Did you notice any of the scrapers?

A. I noticed the location of the scrapers, generally speaking.

Q. We are now referring to trustee's exhibit

(Testimony of James Reynolds.)

number eight. When you were last there, were the scrapers located at the same general area at that time? A. Yes, sir.

Q. And in that long line as they are located there? A. I think there were two.

Q. And was there miscellaneous property at the west of the scrapers as they are now in the picture?

A. Yes, sir.

Q. These scrapers were sold as Miller Scrapers, were they not? Under the trade name?

A. Yes, sir. [27]

Q. And they had the trade name "Miller Scraper and Manufacturing Company" on them, didn't they?

A. Yes, sir.

Q. Manufactured by the Miller Scraper and Manufacturing Company? A. Yes, sir.

Q. So that the Miller Scraper and Manufacturing Company appeared on all of these long line of scrapers, did they not? A. Yes, sir.

Q. And the name "Consolidated Distributors Inc." did not appear in any way?

Mr. Bechtel: They all appear to be manufactured by Miller Scraper and Manufacturing Company.

Mr. Thompson: As far as you know, your company has made no effort to remove these scrapers since November of 1953?

A. As far as I know they have not.

Q. Did the Miller Scraper and Manufacturing Company or Corporation ever assist in the delivery of these scrapers to a buyer? A. No, sir.

Q. Don't on occasion, a Miller Scraper employee

(Testimony of James Reynolds.)

take the scraper out behind a truck and show the purchaser how to use it? A. No, sir.

Q. And assist in delivery? A. No, sir.

Q. Who did make the delivery?

A. The dealer through whom the merchandise was sold.

Q. The dealer would come to the premises and get the scraper, then?

A. No, we would ship the scraper to the dealer by rail. [28]

Q. I believe that is all.

The Referee: Any other questions?

Mr. Barrett: May I ask just one to clear up a misunderstanding of the record.

Q. I have a form of these Trust Receipts previously introduced as exhibits of the Bank of America, would you take them please, the last date appearing on them is sometime in July of 1953.

The Referee: July?

Mr. Barrett: July.

The Referee: All right.

Mr. Bechtel: March was the due date?

Mr. Barrett: The date that I have been looking at, at the bottom of the exhibit, is the date that the payments were due, is that correct?

A. This is the date when they were executed, and this is the date when they were due (pointing to exhibit).

Q. And down at the bottom appears the date of execution and all of them appearing to be no later than March 31st, is that correct?

(Testimony of James Reynolds.)

A. Yes.

Q. So that all of the property claimed by Consolidated Distributors Inc. was pulled onto the portion of the premises to which you have concerned yourself in your testimony prior to the end of March, is that correct? A. Yes.

Q. Now, Consolidated Distributors Inc. had contracted for the entire output, hadn't they? [29]

Mr. Thompson: I object to his question as leading and suggestive and calling for the conclusion of the witness.

Mr. Barrett: I will withdraw my question.

Q. Were there any dealerships on Miller Scrapper's setup?

A. Yes, by Consolidated Distributors Inc.

Q. Consolidated Distributors Inc. was simply an organization to market them, was it? A. Yes.

Q. But it did not engage in the retail selling?

Mr. Thompson: I object to his question as leading and suggestive and calling for the conclusion of the witness.

Mr. Barrett: I will withdraw my question.

Q. By what method were the scrapers retailed?

A. Through authorized and contracted dealers.

Q. Who were equipment dealers in their respective communities? A. Yes.

Q. In this state and in other states, is that correct? A. Yes.

Q. *The* contracted with them?

A. The salesmen employed by the Consolidated Distributors, Inc.

(Testimony of James Reynolds.)

Q. Did Miller Scraper Company contract with any of these dealers for franchises?

A. Not after the execution of the sales agreement between the Consolidated Distributors Inc. and Miller Scraper and Manufacturing Company.

Q. Not after you became the contracting party with Miller, is that correct?

A. That is correct.

Q. That is all. [30]

Mr. Thompson: No further questions.

Mr. Bechtel: No further questions.

The Referee: That is all. We will now have a five minute recess.

(Recess.)

The Bankruptcy Court reconvened at 2:35 p.m.

The Referee: The Hearing will come to order and we will resume.

JOHN AXMAN

Being first duly sworn, testified as follows:

Q. (By Mr. Barrett): Will you state your full name, please? A. John Axman.

Q. Where do you reside?

A. 1458 North Van Ness Avenue, Fresno, California.

Q. In 1952 and 1953 were you employed by Consolidated Distributors Inc.? A. Yes, sir.

Q. As a salesman? A. Yes, sir.

Q. Just what were your duties, can you describe them?

A. My duties were to sell our products to the

(Testimony of John Axman.)

dealers, and then help them to merchandise the same products.

Q. Just what products?

A. The Miller Scraper.

Q. You have seen and are acquainted with the contents of the agreement in writing, and its amendment, which has been introduced and is in evidence here?

A. I have read it, yes.

Q. Just what, briefly stated, were the arrangements between Consolidated Distributors Inc. and Miller Scraper and Manufacturing Company? [31]

Mr. Thompson: I object to his question as leading and suggestive and calling for the conclusion of the witness.

Mr. Barrett: I am asking him to describe the means by which these scrapers were sold and merchandised which, I think, would be important to the business relationship which we have gone into here today.

Mr. Thompson: I believe the question to be as to whether or not there is a change of possession in this case, and I can't see what any particular sale would have to do with the case.

Mr. Bechtel: Well, I think that bears upon the same issue, whether there was a change of possession involved in conducting the business.

Mr. Barrett: With respect to the retailing of these scrapers, what were the arrangements between the Consolidated Distributors Inc. and the retail dealers who were set up?

Mr. Thompson: I object to that as being im-

(Testimony of John Axman.)

material—I can't see what was done later after the purported delivery to some dealers has anything to do with this case.

The Referee: The question here is whether or not there has been a sufficient change in possession under 3440 of the Civil Code. Now, how could the nature of the arrangements that Consolidated Distributors Inc. had with the various dealers tend to prove or disprove any facts bearing on the change of possession?

Mr. Barrett: Well, your Honor, isn't it true that the narrow question of change of possession is the ultimate question on which there is a lot of circumstantial evidence which is quite [32] proper and, in fact, indispensable because of the character of the case?

The Referee: I will overrule the objection, although, frankly, at the moment I can't see any relevancy. Now, will you state the question please?

Mr. Thompson: If you want to state what that arrangement is.

Mr. Barrett: Well, I would like to have the witness testify, your Honor. Is it through setup dealerships?

A. Yes, we set up dealerships. We would sell to these dealers, and help them to sell to the customers, where they needed help, in any form of trouble or failure of the scraper. The dealers would come to Consolidated Distributors Inc., and hold us responsible for the failure of the merchandise, or for any other cause.

(Testimony of John Axman.)

Q. Did Miller Scraper Company set up any dealerships?

A. Not during the period of this contract.

Q. And during the period of this contract, while Consolidated Distributors Inc. were situated on the premises and operated under this contract during that period of time, I am just identifying the time, were there any people who came to the office to talk about sales?

A. Yes, sir.

Q. Now, the office was occupied by whom?

A. The one particular building was occupied by Miller Scraper and Manufacturing Company, and by Consolidated Distributors Inc.

Q. In its respective wings of that building? [33]

A. That is correct.

Q. And people who had an interest in sales, would they call at the office, or would they call at the plant?

A. They would call at the Consolidated Distributors Inc. office, and in the event they unknowingly called at Miller's office, he would send them over to us, telling them that we had control of all the scrapers that were manufactured on the lot, and we would take care of them.

Q. Now, what personnel of Miller's was in that office?

A. Ray Miller was office manager.

Q. And he is still on the premises, is he not?

A. Yes, sir.

Q. Now after, say June of 1953, Consolidated Distributors Inc. no longer occupied those offices,

(Testimony of John Axman.)

did they? A. That is correct.

Q. And between that period of time and the end of the year, approximately how were "drop-ins", so-called, handled?

A. They were referred to Consolidated Distributors Inc. again.

Q. By whom?

A. By Miller Scraper and Manufacturing Company. If Miller was there and an employee of Consolidated Distributors Inc. was there, they handled the matter. Which ever took care of whatever had to be taken care of.

Q. Now, have you ever heard Miller refer people to Consolidated Distributors Inc., even during the period of time Consolidated Distributors Inc. did not occupy those offices?

A. Yes, sir, that is right. [34]

Q. During that period of time, that is, from June on, were you ever there when people would come in? A. That is correct.

Q. Did you ever observe or—strike that. Did you ever know of any instances in which Miller has demonstrated any of those machines?

A. No, I don't.

Q. Not during the period of the contract in effect, he didn't? You know that he did not?

A. That is correct.

Q. Now, will you describe to the Court—with reference to these pictures which I will show you in a moment—the Miller Scraper and Manufactur-

(Testimony of John Axman.)

ing Company's plant is housed in two rectangular buildings in an "L" shape, isn't it?

A. That is correct.

Q. And they are situated adjacent to the railroad and the right-of-way at Manning Avenue and the railroad property?

A. That is correct.

Q. There is a frame building which housed the two offices, is that correct?

A. That is correct.

Q. About how far from the east end of the Miller Scraper and Manufacturing Company building is this office building, can you give an estimate?

A. I would say about ninety to one hundred feet.

Q. Then there is the paint shed which is separate from any of these three buildings?

A. That is right.

Q. Is that situated in a southerly direction?

A. Southerly and westerly, from the office building.

Q. And it is situated approximately mid-way?

A. That is right.

Q. Now where, describe to the Court, were the scrapers parked after they were taken out of the paint shed?

A. Usually, they were parked in a southerly and easterly direction from the office building.

Q. In order that Mr. McGugin will understand the lay-out there, you say southerly and easterly from the office building?

A. That is correct.

Q. The paint shed is situated where with respect to the office building?

A. Southerly and westerly.

(Testimony of John Axman.)

Q. So that the scrapers were usually parked southerly in line with it?

A. That is about right—in line with it. Periodically, there would be quite a number of scrapers which took up so much space that it extended further out in a westerly direction.

Q. And how many lines would there be?

A. Usually two.

Q. And what grouping would be made?

A. The grouping would be made according to the serial numbers.

Q. Now, you and I were out there yesterday?

A. Yes, sir.

Q. And at that time you observed where the scrapers are now parked? A. That is correct.

Q. Observing the line of scrapers as shown in exhibit three of the Trustee's Exhibit for Identification, I will ask you to identify that, would you look at it? A. Yes, sir. [36]

Q. That shows the scrapers parked in a line with the shed, doesn't it? The paint shed?

A. In a southerly direction from it.

Q. And that shows it southerly?

A. Yes, that is correct. I take this as being a true picture of the location of the scrapers as they are now.

Q. Now, is that the location of the scrapers during the period of time that this contract was in effect? A. No, sir.

Q. Were those scrapers then situated aside from where they are now situated on the premises?

(Testimony of John Axman.)

A. Possibly, during a period of cleaning up or levelling, yes.

Q. Was there in the area, the storage area, any so-called "levelling off" or "scraping off" operations carried on during the period that this contract was in effect?

A. You say was there levelling operations carried on?

Q. Yes.

A. Yes, due to erosion and where the scraper was pushed on the ground it would get rough, and so they would clean up periodically and replace them back on the location to make a better appearance.

Q. How much time would be involved because of the moving for that purpose?

A. Sometimes there would be two, three, or four weeks, because it would be done by Miller Scraper and Manufacturing Company to keep his premises in shape and he would just do that [37] when he had men he wasn't using for productive purposes in the factory.

Q. Now, at anytime did you ever observe any of the scrapers at or near any other property?

A. No, sir.

Q. Observing, again, exhibit three, being Trustee's Exhibit Number Three for Identification, you see the wagons parked there?

A. That is correct.

Q. Now, that is taken from a position looking to the east, isn't it?

A. That is correct.

(Testimony of John Axman.)

Q. So that the wagons are in the easterly portion of the lot, aren't they?

A. North portion of the lot.

Q. North portion of the lot?

A. Of this here location in the easterly portion of the lot?

Q. Yes, easterly portion of the Miller premises—now, there are the trailers (pointing to picture). Is there any way that you can estimate the distance between the trailers and the line of the scrapers?

A. From the looks of the picture, approximately thirty feet between the scrapers and the feed wagons.

Q. Well, I just wanted your estimation in feet.

Mr. Thompson: I object to that as being immaterial and irrelevant, because it is based on a picture and obviously you can't tell as to how many feet there is in between the scrapers and the feed wagons.

The Referee: There might be some way to estimate the distance. These scrapers are of a certain width so that he might be able to judge the distance. [38]

Mr. Thompson: I will withdraw my objection.

Mr. Barrett: You are familiar with this ground, aren't you?

A. That is right.

Q. At anytime did you observe any equipment belonging to Miller Scraper and Manufacturing Company, or manufactured by it, grouped closer to the scrapers than thirty feet?

(Testimony of John Axman.)

Mr. Thompson: I object to his question as leading and suggestive and calling for the conclusion of the witness.

The Referee: He is asking him to observe the equipment belonging to Miller. Objection sustained.

Mr. Barrett: The scrapers that were pulled off and parked in this storage area, so-called, were placed on trust receipts to your knowledge, were they not? A. That is correct.

Q. And now, identifying those scrapers to which you referred in your testimony, have you ever observed any equipment belonging to Miller Scraper and Manufacturing Company, or other merchandise manufactured by Miller, grouped closer than thirty feet to the scrapers that you have just identified?

A. No, I haven't.

Q. Now, there is one big junk scraper, isn't there, presently on the premises?

A. That is correct.

Q. And that junk scraper is situated where?

A. To the easterly part of the premises—the foremost easterly part.

Q. Right over on the line?

A. Yes, sir, as I understand it. [39]

Q. And that junk scraper has been there for a long time?

A. It has been there ever since my acquaintance with the premises.

Q. And it is still there? A. Yes, sir.

Q. And was located on the extreme south portion of the premises? A. At what time?

(Testimony of John Axman.)

Q. March of 1952?

A. Well, Miller had some feed wagons out there and other junk. I think there were portions of his orchard heaters or something that he had manufactured in previous years.

Q. And what happened to those articles? Were they moved during your period of observation?

A. They were moved to another area.

Q. Who moved them?

A. Miller Scraper and Manufacturing Corporation.

Q. Are they there at the present time?

A. They are on the lot.

Q. Where are they situated?

A. On the southwesterly part of the lot.

Q. Southwesterly. Now, what—strike that. What was the distance, minimum distance between this aggregate of junk that you refer to and the line of scrapers or the mass of scrapers at anytime that you observed them?

A. I would say fifty feet to seventy-five feet, except for the way they are lined now.

Q. Do you happen to know what and how the scrapers were [40] lined up as they are now at the present time?

A. Miller Scraper and Manufacturing Company was in the process of cleaning up the yard, and they moved and lined them up there to the foremost easterly side of that lot in order to replace them.

(Testimony of John Axman.)

Q. Do you know what time of year that was done?

A. I think it was started thirty days previous to the time Miller Scraper and Manufacturing Company went into bankruptcy—thirty days previously.

Mr. Barrett: You may examine him now.

Q. (By Mr. Thompson): His property consists of about four acres?

A. I understand that is correct.

Q. About how far east of the office does the property line extend, in other words, how far is it from the east edge of the property line?

A. I would say about seventy-five feet.

Q. And you say that the scrapers were located just south of the office, is that right?

A. South and east of the line, mostly to the southerly direction.

Q. And how many feet from the easterly line were they located?

A. As I remember, there used to be about a thirty or forty foot drive around the scrapers.

Q. They were located about thirty or forty feet from the east line of the property?

A. That is right.

Q. This junk scraper that you referred to is located how far from the east line? [41]

A. I think it is right on the line. The only distinction I have on the line is by the change in the looks of the soil due to some of it being farmed and some of it not being farmed.

Q. How long was that junk scraper there?

(Testimony of John Axman.)

A. How long?

Q. Yes. A. This would be a guess.

Q. Well, all right guess.

Mr. Barrett: Give us your best estimate.

A. My best estimate would be approximately the same length with the addition of two feet by six and one half, and if you look at that folder there, it would give us the figure.

Mr. Barrett: You are referring to your specifications?

A. I am referring to the specifications as I know that junk scraper does not have the front dollies or hitch on it, so actually it would be, it is my estimation, it wouldn't be over nineteen feet long.

Mr. Thompson: Was it parked in an east and west direction? A. I think that is right.

Q. With one set of wheels—there are wheels next to the line, near the east line of the property?

A. I think that is correct.

Q. Then you say there was some orchard heaters south of the scrapers, is that right?

A. South and easterly of the scrapers.

Q. And I believe you said they were south in 1952, and they were moved west since?

A. That is right. They also have been moved further south.

Q. They are further south now than they were then, is that correct? [42]

A. Yes, that is correct.

(Testimony of John Axman.)

Q. How much further are these orchard heaters at this time than in 1952 and 1953?

A. Than they are at the present time?

Q. Yes.

A. I would guess one hundred feet.

Q. About one hundred feet further north than they are now, and they are about due south, would you say, of the scrapers?

A. I think that is correct.

Q. Now, how many scrapers at that time, at the most, would you say were parked there?

A. Approximately forty.

Q. About forty, and would they be one row, or two rows?

A. They would be in two rows, and possibly, three rows when the lot is full.

Q. Would there be about twenty scrapers in a row?

A. I don't think they extended that far south. I think they added three rows.

Q. How many scrapers would you say there were in a row? A. Oh, about fifteen.

Q. Would you say there were as many in a row in 1952 and 1953 as they are now in a row?

A. No, about fifteen in a row.

Q. And how far south of the office building did these rows start?

A. I would say directly east of the paint shed.

Q. And how far south of the office would you say that was?

A. Approximately seventy-five feet.

(Testimony of John Axman.)

Q. About seventy-five feet south of the office, and how far south of Manning Avenue is the office? [43]

A. Center line of the highway or which part of the highway?

Q. The south edge of the paved portion of Manning?

A. I would say approximately seventy-five feet.

Q. And how far, would you say it is, from the office to the south edge of the property line?

Q. In what direction from the office?

Q. South?

A. South edge of the office to the south edge of the property?

Q. I——

Mr. Barrett: If you can estimate it, do so. If you can't——

A. It is purely an estimate, but I would guess between four and five hundred feet.

Q. (By Mr. Thompson): And how wide is the property the other way, in your opinion, from the railroad to the east edge, that is, the average width—you understand it is wider at the Manning side than it is at the south edge, is that true?

A. I understand that is correct.

Q. About half-way down, in other words, what is the average width in an east-west direction?

A. I would rather guess from the railroad track—I do not know from the property line on the west side.

(Testimony of John Axman.)

Q. Yes, how far from the property line on the west side would you say it would be?

A. Under four hundred feet.

Q. About four hundred feet?

A. I would say it was between three hundred-fifty and four hundred feet.

Q. Now, are these scrapers parked enough distance apart so [44] that you can move them in and out with ease?

A. An experienced operator could.

Q. How far apart would they be parked?

A. Usually about enough for a man to walk in between them after they are parked.

Q. And the scrapers are about how wide?

A. I——

Mr. Barrett: They have precise widths.

Q. (By Mr. Thompson): The average scraper was approximately eight feet. Now, Mr. Brose had some property located on the premises, did he not, enclosed in a fence located west of the scrapers, did he not? A. That is correct.

Q. And he had a sign on the fence saying "This is the property of C. O. Brose. Keep out." Several signs in fact?

A. I understand that is correct, yes.

Q. Now, is it true that if you weren't present and if no one from Consolidated Distributors Inc. was present, Miller or some other member of the company would show these scrapers, would they not, in your absence?

(Testimony of John Axman.)

A. In our absence they would show the scrapers to someone else, yes.

Q. That is common practice?

A. Yes, that is common practice.

Q. Did you pay them any commission for selling the scrapers or assisting in the sale?

A. No.

Q. This exhibit number three here you stated is a true representation of the situation as it exists at the present time, is that right? [45]

Mr. Barrett: Only with respect to the scrapers, that was his testimony.

Q. (By Mr. Thompson): Isn't it a true representation of the premises as they appear now as far as the property is concerned as it is shown in that picture?

A. As far as I can determine from the picture, that is correct.

Q. I would like to offer this picture in evidence as Trustee's Exhibit Number Three.

The Referee: It is so received.

Q. (By Mr. Thompson): And the wagons there are the same or similar wagons as were on the premises in 1952 and 1953?

A. I think they are.

Q. That is all.

Q. (By Mr. Barrett): Did you see any wagons there when you were last on the premises?

A. No.

Q. Now, look at exhibit number three, you and I, and Mr. W. A. Reynolds were out there yester-

(Testimony of John Axman.)

day, weren't we? A. I was in the office, yes.

Q. Did you look out there and see if there were any wagons? A. No, I did not.

Q. You don't know, do you, whether that picture is an accurate representation of anything except the scrapers?

A. Today, that is correct—it may be ambiguous on the record.

Q. What do you mean, "It may be ambiguous on the record"? [46]

A. I can not tell whether these wagons have been moved, as approximately a week or two ago the situation was different.

Q. Did you see those wagons as shown in this picture? A. I have seen one there.

Q. When?

A. Oh, approximately a month ago.

The Referee: Any other questions?

Q. Well I think, your Honor, I should move to strike that picture probably as not being an accurate representation of the scene, as far as this witness is concerned, at the present time.

Mr. Thompson: I will testify to the taking of the picture, if you like.

Mr. Barrett: All right, then, I will not make the motion. That is all. May I call Ray Miller, please as an adverse party?

The Referee: Ray Miller please.

RAY MILLER

Being first duly sworn, testified as follows:

Mr. Barrett: I am calling Mr. Miller for cross examination. State your full name please?

A. Charles R. Miller.

Q. And you are commonly known as Ray Miller?

A. Yes, that is right.

Q. And where do you reside?

A. 2042 Gaither Street, Selma, California.

Q. You were an officer, were you not, at Miller Scraper and Manufacturing Corporation?

A. Vice President. [47]

Q. At the present time you are managing the business?

A. No, I am just the office manager.

Q. The premises have been sold, have they not?

A. Yes, sir.

Q. To a purchaser in these bankruptcy proceedings, is that true?

A. That is true.

Q. What is the name of the present owner?

A. C. O. Brose.

Q. Mr. Brose is doing business under what name?

Mr. Thompson: I object——

Mr. Barrett: I would like to know who is in possession of the premises, and what has been done since the signing over of the business. Mr. Brose has undertaken to change things from the way it was. And the present situation is different than when delivery of the scrapers were made.

(Testimony of Ray Miller.)

Mr. Thompson: Counsel can not offer the testimony in rebuttal.

The Referee: I can't see any relevancy. Objection sustained.

Q. (By Mr. Barrett): Going back to the period of time that you were vice president of the company, do you recall that Consolidated Distributors Inc. made an agreement in writing with Miller Scraper and Manufacturing Company?

A. That is true.

Q. Shortly thereafter Consolidated occupied a portion of the premises as an office, did they not?

A. That is right.

Q. Beginning with what month?

A. June, 1952.

Q. Now, there is a frame building, is there not, on the premises? A. That is right. [48]

Q. What are the approximate dimensions of that building?

A. About fifteen by thirty, I would say.

Q. It is a rectangular building?

A. Yes, sir.

Q. There is a door facing toward the northerly direction, and a little porch over the door, and right under the eaves of this porch there was a sign, was there not? A. Yes, sir.

Q. What did the sign say?

A. Offices of Consolidated Distributors Inc. and Miller Scraper and Manufacturing Company.

Q. Were all the letters the same size?

A. Yes, sir.

(Testimony of Ray Miller.)

Q. What color?

A. White, and black and white.

Q. And cut out in fancy lettering?

A. Yes, sir.

Q. A portion of it is still there, and the lower portion has been cut off? A. That is right.

Q. The sign which was originally erected and constructed was painted all over? A. Yes, sir.

Q. At present the bottom shows where it has been cut off? A. Yes, sir.

Q. Did you cut that off in your shop?

A. Yes, sir. Our shop foreman did that.

Q. When?

A. That was done approximately October of 1953.

Q. So, until approximately October, Consolidated Distributors Inc.'s name was still there on that sign? A. Yes, sir.

Q. Their name was on the door also?

A. Yes, sir.

Q. When did Consolidated Distributors Inc. move out of the premises?

A. About June. [49]

Q. And prior to that time, as you enter the front door of these premises and entered into a waiting room, there was a door to the right which led into the Miller Scraper and Manufacturing Company and on the left there was a door which led to Consolidated Distributors Inc.?

A. Yes, sir.

(Testimony of Ray Miller.)

Q. There is only one door for egress to and from the building? A. That is right.

Q. Once you get into the building, were the signs on the respective office doors identical?

A. No, I believe Consolidated had their sign etched in gold and block letters, but ours was just in block letters, approximately the same size.

Q. Did Consolidated pay rent?

A. Yes, sir, \$50 a month.

Q. In cash? A. No, by check.

Q. And it is entered on your books?

A. Yes, I have evidence in a portion of my vouchers.

Q. Did you have any help in your office?

A. Yes, sir. A Mr. Al Hucksley was helping.

Q. And you two ran the Miller Scraper and Manufacturing Company office? A. Yes, sir.

Q. And you continued after Consolidated Distributors Inc. left? A. Yes, sir.

Q. Did Consolidated Distributors Inc. have a separate office force?

A. Yes, sir, two—Mr. Reynolds Senior and he was assisted by his son.

Q. And also by a girl? A. Yes, sir. [50]

Q. Consolidated Distributors Inc. had a separate Post Office box number, did they not?

A. Yes, sir.

Q. And did Consolidated Distributors Inc. have a separate letterhead on their stationery?

A. Yes, sir.

Q. Now, with respect to your relationship with

(Testimony of Ray Miller.)

them under the written agreement of March 20, 1952, did your company dispose of all of its manufactured scrapers through Consolidated Distributors Inc. for a period of time?

A. Yes, sir. They were our exclusive distributors.

Q. And all of your scrapers, of every kind and nature, was marketed through Consolidated?

A. Yes, sir.

Q. Now, with respect to the terms of that agreement, which speaks of a storage area, would you tell us where the output of Miller Scraper and Manufacturing Company, which was marketed through Consolidated Distributors Inc., was placed on the premises?

A. Well, it was in a southerly direction from the office, I would say, beginning about fifty to seventy-five feet south.

Mr. Thompson: In order to save time—it is stipulated that this witness' testimony would be the same as the other witnesses.

Mr. Barrett: It is hard to phrase the stipulation for the record. Thank you very much.

Q. You say they were put in there directly south of the office?

A. South and east, but mainly south.

Q. Now, you know where the paint shop is located?

A. Yes, sir.

Q. Which is southerly of both the office and the [51] Miller manufacturing building?

A. That is right.

(Testimony of Ray Miller.)

Q. And 'is between the two. It is located approximately equal distance?

A. Approximately.

Q. But, in a southerly direction how far southwest from the corner of the office building, would you say that the paint shop is located?

A. About fifty to seventy-five feet.

Q. So the scrapers were lined up with the office building and not with the paint shop, is that correct—or easterly of the office building?

A. It was almost directly south when we had two lines there. The line was close to the boundary line—southward and east.

Q. And you had occasion to see those scrapers every day? A. Yes, sir.

Q. And when they were pulled off the assembly line out of the paint shop, did you actually go out and make the presentation of the scraper?

A. No, not exactly, but I saw to it that there was an inspection report completed and filled out in the office.

Q. Now, calling your attention to the area occupied by the scrapers at that time, how many acres were so occupied?

A. Approximately one acre.

Q. For what purpose was the storage area used?

A. For the purpose of stockpiling these scrapers.

Q. How many acres in the Miller premises altogether? A. Four. [52]

Q. Was there any equipment manufactured by

(Testimony of Ray Miller.)

the Miller Scraper and Manufacturing Company other than the scrapers stored in this area?

A. No, not stored in that area.

Q. You are aware, aren't you, of a big junk scraper?

A. Sixteen yard scraper, yes.

Q. It has been there all the time?

A. Yes, prior to the Consolidated Distributor Inc. contract, I believe.

Q. And it is still there? A. Yes, sir.

Q. That is approximately on the boundary?

A. It is right on the east boundary.

Q. Talking about the southern storage area, was there ever anything your company stored there on it?

A. On the southerly part there were wagons.

Q. How many wagons did you manufacture?

A. Twenty-one.

Q. That is the total output of Miller Scraper?

A. Yes.

Q. How many months did they manufacture wagons?

A. Oh, I would say approximately four to five months.

Q. In 1952?

A. We started in the latter part of 1952 and carried it on to 1953.

Q. About how many a month?

A. Well, of course, we worked those in with the scrapers, and I imagine four to five a month.

(Testimony of Ray Miller.)

Q. You say you worked them in on the manufacturing program? A. Yes, sir. [53]

Q. How many of the southerly portion of the lot are yours?

A. I would say as high as fifteen.

Q. What was the closest of any scrapers to the line?

A. Oh, I would say a good seventy-five feet—well, make it fifty feet.

Q. With respect to a line drawn through the paint shop in a southerly direction, would those wagons have been on the east or west side of that line? A. On the east side.

Q. How far would they be from the southern boundary line of the premises?

A. You are still talking about wagons now?

Q. Yes.

A. Possibly, one hundred feet.

Q. And about how long was any wagon stored down on the southern portion of the lot?

A. Well, we actually had a distributor in Oakland that took our output of wagons, but he also parked there—a sort of the same arrangement that we had with Consolidated Distributors Inc. here, but he moved them out in three or four months—I would say four or five months after we had completed the production.

Q. Are there some wagons on the premises at the present time? A. Just one.

Q. Would you look at this exhibit number three

(Testimony of Ray Miller.)

for the Trustee—you can identify the location, can't you? A. Yes.

Q. And where are they situated?

A. I would say directly south of the paint shop.

Q. And further beyond and in what direction are the scrapers in that picture? [54]

A. They are directly south, about fifty to seventy-five feet.

Q. And aren't they also further east?

A. Well, where they are parked now, it is almost to the south of these wagons.

Q. Now, where are there three wagons on the premises at the present time?

A. There is one wagon there.

Q. As of yesterday, were there three wagons there? A. No, there was one wagon.

Q. How long since there was three?

A. It has been approximately two months, anyway, I would say.

Q. About two months—what happened to those two wagons?

A. The one wagon that is remaining there belonged to the Miller Scraper and Manufacturing Company, and the other ones belonged to our distributor in Oakland, and they were removed.

Q. In Exhibit Number Three, the line of scrapers are approximately in their present location, or exactly? A. Exactly.

Q. Now, how long have those scrapers been so situated in that location?

A. Oh, I would say they were moved back there

(Testimony of Ray Miller.)

just about a month prior to our bankruptcy, and when we cleaned off the weeds.

Q. They were lined up there by your organization?
A. Yes, sir.

Q. About what month would that be?

A. Well, let's see, probably along the first of July. [55]

Q. Of 1954?
A. Yes, sir.

Q. And prior to that time where were they located?
A. Just east of that location.

Q. How many feet easterly from their present location were they situated at that time, can you give me an estimate?

A. Approximately twenty-five to fifty feet.

Q. Were there more than one line?

A. At times, yes.

Q. Do you recall whether there was more than one line on the lot?

A. I believe, the last time I was there, I believe they were more or less lined up like they are now.

Q. Just in a single line?
A. Yes, sir.

Q. They were moved by persons under your direction?

A. Yes, Miller Scraper and Manufacturing Company.

Q. During the time that the Consolidated Distributors Inc. had a contract in force with you, was there any scrapers other than what was consigned and set over for Consolidated Distributors Inc. on this lot, or on that portion of the premises in which these scrapers were situated?

(Testimony of Ray Miller.)

A. No, there were not.

Q. Now, in about December there of last year, Consolidated Distributors Inc.'s agreement was cancelled, is that true? A. That is true.

Q. There were a few scrapers manufactured by your organization subsequently, wasn't there?

A. Yes.

Q. And what did you do with those scrapers?

A. Well, they were six and one-half cubic yard size and I believe there were orders for those shipments and—— [56]

Q. And they were moved right out?

A. Yes.

Q. Did you ever store your own manufactured equipment other than what we are talking about on these Trust Receipts in a triangular space bounded by the plant, Manning Avenue and the railway right-of-way?

A. Yes, we had scrapers sitting there.

Q. May I ask you, during the period of time that Consolidated Distributors Inc. had its agreement in force with you, a part of that time Consolidated Distributors Inc. had no office there, did they?

A. Well, right at the first, of course. They moved in shortly after the office was completed and then from June of 1953 to December of 1953 they were not there.

Q. They did not have an office there?

A. No.

Q. And from time to time representatives and

(Testimony of Ray Miller.)

agents and servants of Consolidated Distributors Inc. would call at your office? A. Yes.

Q. Mr. Axman called, didn't he, periodically?

A. Yes.

Q. James Reynolds? A. Yes.

Q. And Mr. W. A. Reynolds? A. Yes.

Q. Anyone else? A. No.

Q. They were the active servants of the company? A. Yes, sir.

Q. And supposing someone would come into the office during that period of time and inquire about those scrapers—what would you tell them?

A. Well, if there were no representatives of Consolidated Distributors Inc. to show them the scrapers, and show them the features of it, we [57] would either make arrangements for them or contact them.

Q. Now, you were in charge of the office during that period of time, weren't you? A. Yes.

Q. And did you go out there usually with them?

A. If there was no one else around—usually my brother was there or someone else there to show them around.

Q. And did you or a representative of your organization tell everyone about the Consolidated Scrapers, and take pains to point out to everyone that those were Consolidated Scrapers?

A. Yes, if they were interested in purchasing a scraper, and we pointed out the fact that they were exclusive distributors.

(Testimony of Ray Miller.)

Q. And you also pointed out the fact that they were manufactured by you? A. Yes.

Q. But everyone was personally notified that they were owned by Consolidated Distributors Inc.?

A. Yes.

The Referee: We will now have a recess.

(The Bankruptcy proceedings recessed at 3:45 p.m.)

(The Bankruptcy proceedings reconvened at 4:10 p.m.)

The Referee: The Hearing will come to order.

Mr. Barrett: Sir, I trust we will finish by 5:00 o'clock.

The Referee: The fact is there was a porch on the front of the building and the wings are off the waiting room of it. Several times that has been brought up. I don't think there is any dispute about it, and I am convinced that these trailers are just to the south and slightly to the east of the [58] office building there during the time the contract was in effect, and they were moved to the present position along about July of this year by the Miller Scraper and Manufacturing Company.

Mr. Barrett: Well, I hope I am not boring you, your Honor.

The Referee: Well, it is a highly technical situation. I can see that, but we just can't go on and on with small details—it has been just one detail after another.

Mr. Barrett: Let's proceed, then, keeping in mind the facts which are well established. Is it

(Testimony of Ray Miller.)

your Honor's intention to permit us to argue the matter today?

The Referee: No, I don't think we will have time.

Mr. Barrett: All right, we can at least finish the testimony.

The Referee: I hope so.

Q. (By Mr. Barrett): Mr. Miller, you have heard the previous testimony? A. Yes, sir.

Q. You have been here all during this hearing, and by way of shortening it up, there can be stipulated by reference to what has been previously testified to. I will show you these Trust Receipts—

Mr. Thompson: I believe there is no dispute about that.

Mr. Barrett: It may be stipulated—

Mr. Thompson: The Trust Receipts are the same ones you showed the other witnesses.

Mr. Barrett: Yes.

Q. The testimony previously received concerning the method of sending those invoices twice a month and what the invoice contained, how they were attached, and presented to the bank, is substantially correct?

Mr. Thompson: That is correct.

Q. (By Mr. Barrett): Now, with respect to the money that you received from the Bank of America, have you received—it is a fact that you have received all of the money represented by the sales prices of the articles listed on all of these Trust Receipts?

(Testimony of Ray Miller.)

A. That is correct—not the sales price, but the cost price to Consolidated Distributors Inc.

Q. Yes, that is the price of which you disposed of them to Consolidated Distributors Inc.—not the retail price; and you have received every dime on that prior to going into bankruptcy, and most of it, in fact, all of it, more than four months prior to bankruptcy, is that right? A. Yes.

Q. That is all.

Mr. Thompson: Mr. Miller, when people would come to see these scrapers, and members of the Consolidated Distributors Inc. weren't present, you would you show them, wouldn't you? A. Yes.

Q. Would they inquire as to who owned the scrapers?

A. Well, yes, when it got to the point that they were interested in buying the scrapers. Usually they were passing by and had no special interest, then, we didn't go into details of who owned them and so forth.

Q. And in most instances when you showed the scrapers, was anything whatsoever said as to who owned the scrapers?

A. Yes, most of the time. [60]

Q. Didn't you tell me half an hour ago, Mr. Miller, usually nothing whatsoever was said as to who owned the scrapers?

A. Well, if it got to the point where they wanted to buy the scraper, but where they weren't definitely interested in buying the scrapers—

Q. Didn't you tell me half an hour ago that

(Testimony of Ray Miller.)

that subject never came up as to who owned the scrapers—just answer yes or no?

A. Well, I guess——

Q. Just say, yes or no? A. I'd say yes.

Mr. Barrett: What is the explanation for the statement that you made to Mr. Thompson, if any?

A. Well, what I had in mind at that time—anybody that was just coming by and looking at the scrapers just out of curiosity, we usually didn't go into the trouble of explaining who our distributor was, and all that.

Q. If they were just idle curiosity seekers?

A. Yes, if they got to the point where they had to buy the scraper, then, we would go into the details of who would they buy them through.

The Referee: How about creditors and people who were supplying the fuel, and other services, and so forth. Did you tell them as to whom the scrapers belonged?

A. Yes, we definitely did. When the jobbers were coming through, and the salesmen who were representatives of these different companies.

The Referee: You told them about the scrapers out in the yard—you told them they belonged to the Consolidated Distributors Inc.? [61]

A. Yes, and they knew that we had an arrangement with Consolidated Distributors Inc.

The Referee: All of your creditors—did you tell the power company? A. No, I did not.

The Referee: The telephone company?

A. Not the telephone company.

(Testimony of Ray Miller.)

The Referee: All of your creditors?

A. No, not all of our creditors—maybe the steel salesmen.

The Referee: One of the crucial questions here is the fact that credit has been extended to somebody acting as an owner, and that seems to be one of the material facts in this case.

Mr. Barrett: It would seem, your Honor, as the contract is recorded, that these large suppliers would keep themselves informed. I don't think you can produce any evidence on that point. With respect to people who did come into your office, as did your own suppliers and jobbers and that sort of thing, you told them, a large number of them, didn't you?

A. Yes, just in the ordinary course of conversation when they asked us who all the scrapers belonged to.

Q. And don't you know, as a matter of common knowledge, that the creditors knew who the scrapers belonged to?

A. I wouldn't say all of them.

Q. All of them did not know about the bankruptcy? A. No, sir.

Q. But as far as the telephone company is concerned, they did? A. That is right. [62]

Q. As far as the bigger suppliers are concerned, you had an opportunity to talk to a great many of them didn't you? A. Yes.

Q. (By Mr. Thompson): Did you owe many of

(Testimony of Ray Miller.)

the creditors before you entered with this arrangement with the Consolidated Distributors Inc.?

A. Yes.

Q. How much?

A. A very small amount—in the four or five thousand dollar bracket.

Q. And do you still owe money to some of these creditors?

A. Yes.

Q. And after June of 1953 did you manufacture anything?

A. Well, we did to some extent, and that is by warehousing with Mr. Brose—who had merchandise still in the yard, and that is the way we worked all of the raw materials.

Q. Were there any persons who became creditors during 1952 and 1953?

A. Yes.

Q. And you still owe them money, do you not?

A. Yes.

Q. That is all.

Mr. Barrett: No further questions.

The Referee: That is all?

Mr. Barrett: I will rest the Consolidated Distributors Inc. case now, your Honor.

Mr. Bechtel: I would like to call Mr. Forrest, now, if I may your Honor?

The Referee: Yes. [63]

JESSE A. FORREST

Being first duly sworn, testified as follows:

Q. (By Mr. Bechtel): State your full name, please?

A. Mr. Jesse A. Forrest.

(Testimony of Jesse A. Forrest.)

Q. Where do you reside?

A. 2734 A Street, Selma, California.

Q. And you are manager of the Selma Branch Bank, Bank of America? A. Yes, sir.

Q. And as such, are you familiar with the transactions the bank had with Consolidated Distributors Inc.? A. I am.

Q. When did that financing begin?

A. I would say in June, 1952.

Q. And what was the nature of that financing?

A. We had agreed to loan Miller Scraper and Manufacturing Company and Consolidated Distributors Incorporated ninety percent of their cost, of the equipment.

Q. Under what sort of security?

A. Under Trust Receipt financing, and on their honesty and fairness, and on this trust receipt basis.

(Statement by Referee.)

Mr. Bechtel: Well, these preliminary questions I have asked here for the purpose of showing a change of possession. Now, in connection with the trust receipt financing which you just testified to, was it your practice to have inspection, or inspections, made of the property under the trust receipts? A. It was.

Q. How frequently?

A. At least once a month. [64]

Q. When did those inspections commence?

A. In—if you permit me to, I will refer to our inspection sheet here and I will tell you exactly the first time—it was on July 29, 1952.

(Testimony of Jesse A. Forrest.)

Q. And your testimony is that regular monthly inspections were made thereafter?

A. Yes, sir, they were.

Q. To and including what date?

A. September 29, 1954.

Q. I believe it is agreed, is it not, that all of the equipment described in the trust receipts are on the premises at the present time with the exception of those which have been sold or are in the process of selling?

Mr. Thompson: So stipulated.

Mr. Barrett: I will stipulate also.

Q. (By Mr. Bechtel): Now, how many, approximately, of those inspections did you make personally?

A. Just roughly, I would say fifty percent or a little more.

Q. And would those inspections consist of visiting the premises yourself?

A. That is correct.

Q. And what was the extent of your checking?

A. We would have to give you the whole detail. We have prepared this list from the outstanding items of the trust receipts that you have seen, and then we check these flooring inspection reports, the serial numbers, and the size of the scraper with those physical items that were on the premises.

Q. And upon what portion of the premises were [65] the scrapers located during the time of your first inspection?

(Testimony of Jesse A. Forrest.)

A. Well, I would say that they were south of the office, and paint shop.

Q. In a place set apart from the rest of it?

A. They appeared to be set apart, yes, because some of them were so close together you could hardly get in between them, some of the scrapers, and *their* being lined up so close together that you could hardly get in between them to read the serial numbers.

Q. You weren't referring to the scrapers under the trust receipts? A. Yes, that is right.

Q. And did you also find that situation to be true? A. Yes, sir.

Q. They were?

A. Not all of them were that close together, but a number of them.

Q. During your inspections that you made personally, did you find that the scrapers under your trust receipts were always more or less in the same area as they had been in your initial inspection?

A. Yes, sir.

Q. And did you have any difficulty at anytime locating all the scrapers described in your trust receipts? A. No, sir.

Q. Were there any other items not described in your trust receipts mingled with the scrapers described in your trust receipts?

A. I would say no, not from the first to the last. If you mean from one number to the other, there was none intermingled in there that I can recall

(Testimony of Jesse A. Forrest.)

that were not identified [66] by the numbers on our trust receipts.

Q. Would it be your testimony that the scrapers described in the trust receipts were set apart from any property on the premises? A. Yes.

Q. That is all.

Q. (By Mr. Thompson): These scrapers were out on bare ground? A. Yes.

Q. And there were no fences between these scrapers and property located within fifty feet of these scrapers? A. No.

Q. Nor any lines or other things on the ground to differentiate between these scrapers?

A. Other than this fact—it appeared that right after they originally put these scrapers out there they seemed to dig a space and flatten it out—that differentiated it from the other areas. They flattened this area out.

Q. And weeds would grow up and rain would erode the area and they would move the scrapers off onto another space?

A. If they moved them, in my recollection, they would be only moved a few feet north or south from where they were located. They wouldn't be moved from the easterly side or the westerly side.

Mr. Barrett: You have heard the previous testimony concerning how the scrapers had been?

A. Yes, sir.

Q. Which is stipulated as being correct, is that true? [67]

A. When they brought in the trust receipt—

(Testimony of Jesse A. Forrest.)

Mr. Thompson: I stipulate no dispute in that regard.

Q. (By Mr. Barrett): How many dollars has your bank paid Miller for the items now described in the trust receipts and remaining unsold?

A. As of the date of our last inspection on September 29, twenty-three items totalling \$30,787 were on hand, and unsold, and four had been sold totaling \$8,709—proceeds of which are in the hands of trustees—making a total of twenty-seven items, and in dollar amount, \$39,496.00.

Q. I take it, Mr. Thompson and Mr. Bechtel, there is no dispute about the identity of the articles?

Mr. Thompson: No.

Mr. Bechtel: No.

Mr. Thompson: In other words, there is nothing missing that hasn't been properly accounted for?

Mr. Barrett: Now, these flooring inspection reports that you have before you are records kept in the regular course of business that you have in the bank? A. Yes, sir.

Q. Required by the rules and regulations of the bank? A. That is right.

Q. Is this—let me see the last one, please?

The Referee: While he is looking at those—you have already brought out the arrangements with the Secretary of State?

Mr. Bechtel: Yes, your Honor, I have.

Mr. Barrett: It is attached to the exhibits, your Honor. [68]

(Testimony of Jesse A. Forrest.)

Mr. Bechtel: Not to those exhibits, but they have been filed.

Mr. Barrett: Your Honor, if there be no objection, I wish to offer this last flooring inspection report from which the witness read, the account in dollars, which is a report dated 9/29/54 bearing the signature of Mr. Forrest. Is that your signature?

A. Yes, sir.

Q. I wish to offer this into evidence next in order.

The Referee: It will be so received and marked Exhibit D.

Q. Did you make an inspection report in September of last year? A. Yes, sir.

Q. May I look at that please? A. Yes.

Q. You made one every month including September, didn't you?

A. Yes. The bankruptcy was filed in August?

The Referee: August 2, 1954.

Q. (By Mr. Barrett): Now, your Honor, for the purpose of showing the continuity of these articles, I would like to introduce two more of these reports into evidence, one report dated 9/22/53, which is signed by J. R. Gilbert, and H. E. Stauker, in Fresno. Are they officers or employees of the bank? A. Yes.

Q. I would like to introduce that into evidence, your Honor, and lastly, the report dated 7/27/54, signed by J. R. Gilbert and yourself—and that is on the reverse of the first sheet signed by yourself

(Testimony of Jesse A. Forrest.)

and on the next page by Mr. Gilbert. May I introduce them, respectively, as next in order?

The Referee: The inspection report dated 9/22/53 will be received in evidence as Exhibit E.

Mr. Barrett: I have no further questions.

Mr. Thompson: No further questions.

Mr. Bechtel: Nothing further. I would like to suggest, your Honor, that your Clerk have photostats made of those last three exhibits.

The Referee: Yes, you take that up with her. That is all Mr. Forrest.

Mr. Barrett: Do you have any evidence?

Mr. Thompson: I would like to offer those pictures in evidence. Do you want me to testify?

Mr. Barrett: Well, that sort of puts me in a spot, but I don't want to stipulate to admitting the pictures which I think are immaterial, and perhaps misleading, but you have already told us about when they were taken. What is—may I ask what your purpose would be to introduce them?

Mr. Thompson: Show them in adjudication of bankruptcy of what it is worth.

Mr. Bechtel: I am going to object on the grounds that it is immaterial and irrelevant by reason of the fact that the only pertinent testimony I would think is the condition of the tractors at the time, or scrapers, at the time that "possession" changed from the Miller Scraper and Manufacturing Company to Consolidated Distributors Incorporated.

The Referee: How about the word "continuous"?

Mr. Bechtel: Well, continuous—there is a question of what [70] the word “continuous” implies.

The Referee: It has not necessarily been established, but it is relevant to that fact — objection overruled. The exhibits are marked.

Mr. Bechtel: I think they are poor pictures.

Mr. Thompson: You are not objecting to the lack of foundation?

Mr. Bechtel: No, I would stipulate they were pictures made by you and indicated——

Mr. Barrett: Your Honor, this case presents some very fine points.

Mr. Thompson: Your Honor, the court has raised the question of creditors’ reliance. I must confess I was caught by surprise and so I didn’t get a chance to get any witnesses and was under the impression that the law is not concerned with actual reliance by creditors. But I would like to see if any creditors were misled, and get their testimony on that point.

The Referee: I think, probably, in fairness to both sides, they should have time to consider the evidence and ascertain whether or not they have any further facts to produce, and so that we will not be restricted by lack of time and because there is a considerable amount of money involved here,—I think that we will continue this to a future date.

Mr. Thompson: We would have to come back to argue it anyhow.

Mr. Barrett: We certainly wish to have an opportunity to advise the Court upon the law, either in written form or orally.

The Referee: All right, let's continue the matter then to some [71] later date. I will have to consult my calendar when I go back to my office.

Mr. Bechtel: I would like to suggest that the reporter give us a transcript so that we shall have an opportunity to review it.

(The Bankruptcy proceedings came to an end at 4:35 p.m.) [72]

[Endorsed]: Filed June 3, 1955.

CONSOLIDATED DISTRICT NO. 10

TRUCK RENTALS: FLOORING

8 RP 1760 (76)

The undersigned as Trustee (as on the meeting of the terms as defined in the Uniform Trust Statute (California) Law of California) heretofore referred to as Trustee in the Uniform Trust Statute (California) Law of California, subject to the conditions set forth below and on revenue bond, the following described chattels, to-wit:

Year	Make	Amount	Motor No.	Serial No.	Cost	Resale Price	Date
1952	Miller	Rotary Scraper 3 cu. yd.		C-357	1770.00	1590.00	1
1952	Miller	Rotary Scraper 3 cu. yd.		C-358	1770.00	1590.00	2
1952	Miller	Rotary Scraper 3 cu. yd.		C-359	1770.00	1590.00	3
1952	Miller	Rotary Scraper 3 cu. yd.		C-360	1770.00	1590.00	4
1952	Miller	Rotary Scraper 3 cu. yd.		C-361	1770.00	1590.00	5
1952	Miller	Rotary Scraper 3 cu. yd.		C-362	1770.00	1590.00	6
1952	Miller	Rotary Scraper 3 cu. yd.		C-363	1770.00	1590.00	7
1952	Miller	Rotary Scraper 3 cu. yd.		C-364	1770.00	1590.00	8
1952	Miller	Rotary Scraper 3 cu. yd.		C-365	1770.00	1590.00	9
1952	Miller	Rotary Scraper 3 cu. yd.		C-366	1770.00	1590.00	10
1952	Miller	Rotary Scraper 3 cu. yd.		B-51	3142.00	2100.00	11
1952	Miller	Rotary Scraper 3 cu. yd.					12
1952	Miller	Rotary Scraper 3 cu. yd.					13
1952	Miller	Rotary Scraper 3 cu. yd.					14

The Trustee hereby acknowledges and agrees that a security interest (as defined in the Uniform Trust Receipts Law of California) in the above chattels remains in or will remain in Entruster, or if not heretofore retained, hereby transfers title and security interest in said chattels to Entruster, all as security for the payment of \$ 17,700.00 together with interest thereon from date hereof at the rate of 5% per cent (5%) per annum, until paid, and that the Trustee does hereby agree to pay said sum to the said Entruster at its 50133

Branch, in this City on or before Jan 1 19 53 the date on which this Trust Receipt transaction shall terminate, unless previously terminated in accordance with provisions set forth on revenue bond or extended in writing by the Entruster.

DATED at Los Angeles, California, this 5th day of January 1953

WITNESS *W. G. King* Consolidated District 10, California

By *James O. King* Trustee

TRUSTEE'S ORIGINAL

The undersigned as Trustee (to-wit: the meeting of the term as defined in the Uniform Trust Receipts Law of California) heretofore referred to as Trustee, hereby acknowledges the following interest in the above described property, subject to the conditions set forth below and on reverse hereof, the following Association previously referred to as "Entruster", subject to the conditions set forth below and on reverse hereof, the following described property, to-wit:

Year	Make	Model	Serial No.	Entrusted	Serial No.	Car	Rebate Price	Date
1952	Miller	Rotary Scraper	C-357	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-358	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-359	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-360	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-361	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-362	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-363	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-364	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-365	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	C-366	3 cu. yd.			1500.00	10
1952	Miller	Rotary Scraper	B-31	3 cu. yd.			1500.00	1
1952	Miller	Rotary Scraper	B-32	3 cu. yd.			1500.00	12
1952	Miller	Rotary Scraper	B-33	3 cu. yd.			1500.00	13
1952	Miller	Rotary Scraper	B-34	3 cu. yd.			1500.00	14

The Trustee hereby acknowledges and agrees that a security interest (as defined in the Uniform Trust Receipts Law of California) in the above chattels remains in or will remain in Entruster, or if not heretofore paid, jointly or severally, together with interest thereon from date hereof at the rate of 5 per cent (5) per annum, until paid, and that the Trustee does hereby agree to pay and sum to the said Entruster at its San Francisco Branch, in this City on or before May 1, 1953, the date on which the Trust Receipt transaction shall terminate, unless previously terminated in accordance with provisions set forth on reverse hereof or extended in writing by the Entruster.

DATED at San Francisco, California, this 5th day of January, 1953.

WITNESS W. B. Guy By James C. Guy
James C. Guy Trustee
James C. Guy Trustee

MILLER SCRAPER COMPANY

Corner 99 Highway and Manning Avenue
P.O. Box 58
SELMA, CALIFORNIA

Sold to Bank of America Date Dec. 31, 1952
Selma, Calif. Your No. 1055 - 3 yd. scraper
 Date Shipped Delivered to
Miller Scraper Co. lot.

Quantity	Description	Price	Amount
10	3 Cu. Yd. Miller Rotary Scrapers w/dollies. Serial Nos. C-357, C-358, C-359, C-360, C-361, C-362, C-363, C-364, C-365 and C-366	2950.00	29500.00
	Less 40%		11800.00
			\$17700.00
1	6 1/2 Cu. Yd. Miller Rotary Scraper w/dollies. Serial No. B-81	5720.00	
	Less 40%	3432.00	
	Total		\$21132.00
	For account of:		
	Consolidated Industries, Inc. P.O. Box 627 Selma, California		

1-189-1000-1000



CLAIMANT'S EXHIBIT "A"

This Agreement, made and entered into at Selma, California, this 20th day of March, 1952, by and between Kenneth L. Miller, doing business as Miller Scraper Co. of Selma, California, hereinafter called the Manufacturer, and Industrial Equipment Co., Inc., a Colorado corporation of Denver, Colorado, hereinafter called the Distributor;

Witnesseth: That for and in consideration of the acts, promises, covenants, and agreements on the part of the parties hereto to be done, kept and performed as hereinafter set forth, it is agreed as follows:

1. That the Manufacturer hereby grants to the Distributor exclusive right of sale of all Miller Scrapers manufactured by said Manufacturer save and except those scrapers now on order, being approximately thirty in number, and further, subject to the distribution agreement by and between the Manufacturer and Jack Garrett of Coolidge, Arizona, and Chester O. Frey of Selma, California. In reference to said last mentioned distributing contracts, the Manufacturer agrees to cancel same on or before six months from date hereof.

2. For and in consideration of the granting of the exclusive distributorship to the Distributor herein, said Distributor agrees to loan to, or procure a loan in favor of, said Manufacturer in the sum of \$75,000.00 within thirty (30) days from date, payable in advances as money is needed by the Manufacturer for enlargement of the factory

Claimant's Exhibit A—(Continued)

and equipment as hereinafter stated. The loan is to be secured by a deed of trust on the real property situated in the County of Fresno, State of California, described as follows:—

That portion of the Northeast quarter of Section 26, Township 15 South, Range 21 East, Mount Diablo Base and Meridian, described as follows: Beginning at a point on the North line of said Section, 1620 feet North $89^{\circ} 41'$ West of the Northeast corner of said Section; thence South $0^{\circ} 19'$ West 659.63 feet to the Northeasterly line of the Southern Pacific Railroad Co.'s Right of Way; thence along said Right of Way, North $41^{\circ} 01'$ West 880.50 feet to said North line of Section 26; thence South $98^{\circ} 41'$ East 583.25 feet along said Section line to the point of beginning.

EXCEPT the East 75 feet of the North 290 feet thereof;

together with chattel mortgage on all fixtures and equipment located on said real property, an itemized list of which is hereto attached, made a part hereof and hereby referred to for further certainty. As additional security, the Manufacturer agrees to take out a policy or policies of term life insurance covering the life of the Manufacturer with the Distributor as beneficiary in an amount equal to the unpaid balance of the hereinbefore mentioned loan; and in this respect, it is understood and agreed that in the event of the death of said Manufacturer and payment to the Distributor or loaning agency of the balance of the loan from said policy

Claimant's Exhibit A—(Continued)

or policies, that said Distributor will issue releases or sign any other necessary papers for the release of other securities given and any excess of the moneys collected on the policies over and above the amount of the loan unpaid. The aforementioned deed of trust is to provide for advances, the aggregate amount of the loan not to exceed \$75,000.00. The total aggregate amount of the said loan shall be payable over a period of ten years in equal monthly installment payments commencing on the 20th day of September, 1952, and payable on the 20th day of each and every month thereafter until the said obligation is fully paid, together with interest thereon at the rate of six per cent per annum payable September 20, 1952, and on the 20th day of each and every month thereafter with the said installment payments, and the interest to be less than that if the loan can be obtained for less interest.

It is understood and agreed by and between the parties to this contract, that a letter of credit will be established with the Bank of America with a maximum liability of \$75,000.00, under which the Manufacturer may draw drafts for the purchase of equipment, the construction of additional buildings or additions required and the payment of the existing liens on the real and personal property.

The Manufacturer hereby agrees that, within 120 days after the loan hereinbefore mentioned is made available to him, he will increase the size of his plant and plant equipment to the extent that

Claimant's Exhibit A—(Continued)

he will then produce and manufacture two 4½ yard scrapers per day or the equivalent thereof in merchandise of other scrapers predicated on the retail list price as herein stated.

3. The Distributor agrees to purchase from the Manufacturer all the output or production of said Manufacturer and agrees to accept all production upon the completion at the yard of the manufacturing plant of the Manufacturer and agrees to pay for same on the 1st and 15th days of each and every month during the term of this agreement. Manufacturer agrees that all manufactured items delivered to the Distributor F.O.B. manufacturing plant shall be complete as to standard equipment.

4. As hereinbefore stated, Distributor is to have exclusive right to sell all the output of scrapers of the Manufacturer, both foreign and domestic, upon the following conditions:

(a) Distributor shall receive manufactured items at point of manufacturing.

(b) The Manufacturer agrees to sell to the Distributor items manufactured by the Manufacturer for cash F.O.B. point of manufacturing at forty per cent of the list retail price of items manufactured.

(c) It is agreed by and between the parties hereto that the present list retail price on the Miller Rotary Scraper are as follows:

	List price
2-yard scraper with standard equipment	\$1925.00
3-yard " " " "	2950.00

Claimant's Exhibit A—(Continued)

4½-yard	"	"	"	"	4210.00
6½-yard	"	"	"	"	5720.00
10-yard	"	"	"	"	10500.00

5. It is agreed that the foregoing prices as listed in the preceding paragraph and the wholesale price to Distributor based upon said list price shall be subject to change caused by fluctuating prices of materials and labor, and it is agreed that the retail prices shall be increased or decreased proportionately to said increases or decreases in materials and labor predicated on the retail list price of scrapers hereinabove set forth, but it being specifically understood and agreed that the Manufacturer is to receive not less than ten per cent net above the cost of manufacturing.

6. It is understood and agreed that the Manufacturer will furnish to the Distributor necessary parts for the maintenance of the scrapers hereinabove referred to sold and distributed to the Distributor, and that the Distributor shall have the sole and exclusive right of purchase of said parts at a retail price list to be maintained by the Manufacturer less per cent; it being further understood and agreed that any accessories handled by Manufacturer will be invoiced through the Distributor hereto.

7. The Manufacturer does hereby agree that he will maintain weight, quality, grades, texture and strength of materials as well as parts and finished products in at least the present quality of grades, textures and strength of parts and finished prod-

Claimant's Exhibit A—(Continued)

ucts as the same are now manufactured and that he will not change the same without the consent of the parties hereto.

8. The Distributor does hereby agree that it will warehouse or assist the Manufacturer in warehousing the materials and supplies of not less than \$25,000.00 in value, and when the Manufacturer is able to and does produce two scrapers per day for the Distributor, then the Distributor shall increase the said credit from \$25,000.00 up to but not to exceed \$50,000.00 for warehouse materials.

9. The Manufacturer does further agree that in case Manufacturer shall manufacture other items other than those not now manufactured by said Manufacturer, that said Distributor shall have the first right to include the same upon the same terms and conditions as in this agreement set forth but the said Distributor must notify said Manufacturer within thirty days after notice thereof as to whether or not it wishes to have said new items included in its agreement; otherwise, Manufacturer shall be free to make other contracts for the sale and distribution of the items not included in this contract.

10. The Manufacturer does hereby agree that during the term of this agreement he will maintain an engineering and research program of not less than that presently maintained for the improvement of items manufactured by said Manufacturer.

11. The Manufacturer during the term of this agreement hereby agrees to furnish all industrial advertising.

Claimant's Exhibit A—(Continued)

12. The Distributor hereby agrees to maintain throughout the period of this agreement a good and adequate sales promotion program and sales organization in order to fulfill the terms of this contract for the sale of the items herein referred to.

The Manufacturer does hereby agree not to subcontract any manufacture of Miller Rotary Scrapers without the consent of the parties hereto.

13. Manufacturer further agrees that in the event of an intended sale of the Miller Scraper Co. by said Manufacturer which shall include the property on which the property is now located or hereafter located and all equipment in the said plant and all equipment, including automobiles and materials and supplies on hand, outside of the plant used in connection with the said business including the present patent and patents now pending and any patent then pending at the time of such intended sale. Then, and in that event said Manufacturer shall notify the Distributor of the terms and conditions of said intended sale which shall include all of the above mentioned property, and the said Distributor is to have the first right and option to purchase upon meeting the terms and conditions as set forth by the Manufacturer. It shall be the duty of the Distributor to notify the Manufacturer of their intent to purchase within thirty days after notice is received by them from the Manufacturer stating the terms and conditions of such sale, and in the event the Distributor does not so notify the Manufacturer of its intent to

Claimant's Exhibit A—(Continued)

purchase, the Manufacturer may then sell to any interested party without obligation to the Distributor; provided also, that the Manufacturer reserves the right to incorporate the said business and take over all of the property above mentioned including the patent and patents pending, and any such incorporation of such business by the Manufacturer shall assume the obligation of this agreement and agree to be bound thereby.

14. The Distributor, its agents, servants, employees, successors and assigns, does hereby agree that in case of the termination of this agreement that it will not, for a period of five years, directly or indirectly, go into any competitive business with the Manufacturer, nor will the said Distributor, its agents, servants, employees, successors or assigns, directly or indirectly, handle or market through its own sales organization or through any sales organization owned or controlled by Distributor or any organization in which Distributor owns an interest, any items manufactured by Manufacturer and previously distributed by said Distributor, it being expressly understood and agreed that this restriction shall not apply to any items manufactured by the Manufacturer but not distributed by this Distributor.

15. In the event Distributor sells or assigns this contract shall be immediately terminable at the option of the Manufacturer.

16. Notice as herein used means written notice and all notices are to be made by registered mail

Claimant's Exhibit A—(Continued)

with return receipt requested addressed to Miller Scraper Co. at P. O. Box 58, Selma, California and Industrial Equipment Co. Inc. at 109 Prospect Street, Fort Morgan, Colorado.

17. Manufacturer further agrees that Distributor is to have an option to continue this agreement for an additional five years from the termination date hereof. In order to exercise said option Distributor shall give Manufacturer ninety days notice of his intention to take up and exercise said option.

18. It is agreed that neither party hereto shall be responsible to the other one under this agreement for failure to comply therewith by reason of strikes, lock-outs, labor disturbances, war, public calamity, or governmental regulation.

19. It is agreed that time is the essence of this agreement, and in the event of the violation of any of the promises, covenants, and agreements as herein contained and set forth by either party, the innocent injured party shall be considered to and shall have cause to terminate this agreement.

20. It is agreed that the patent and patents pending of Kenneth L. Miller, the Manufacturer, will be pledged to the loaner on any necessary papers for such purpose as a part of the security for such loan.

21. This contract is made for the purpose herein set forth only, and does not in any manner delegate to the Distributor the right or authority to

Claimant's Exhibit A—(Continued)

transact any business, or incur any obligation for, or in the name of the Manufacturer.

22. It is understood and agreed that the sole distributorship given to the Distributor is predicated upon and subject to the financial assistance herein agreed on, and in the event the financial assistance is not furnished as agreed on, the distributorship terminates.

23. It is understood and agreed that the stipulations herein shall bind the heirs, executors, administrators, successors in interest, and assigns of the respective parties hereto.

24. It is understood and agreed that Mary Miller, the wife of the Manufacturer herein, will sign this agreement and any and all other papers necessary for the consummation of this agreement.

25. It is agreed that in the event of the change of address of either party that any new address acquired shall be communicated to the other party by a notice in writing as herein agreed on.

26. It is agreed that in the event of an intended sale by the Distributor, of its corporation, Industrial Equipment Co., Inc., of Denver, Colorado, together with the property of such corporation, that the said Distributor will notify the Manufacturer of such intended sale and the terms and conditions of such sale, the Manufacturer shall then have the first right and option to purchase the Distributor corporation and its share of stock together with all of the listings of the sale organization and literature and office equipment and auto-

Claimant's Exhibit A—(Continued)

mobiles and other equipment belonging to said corporation, and it shall be the duty of the Manufacturer to notify the Distributor of his or its intention to purchase such property within thirty days after notice is received by the Manufacturer from the Distributor stating such terms and conditions of sale and if the Manufacturer does not notify the Distributor of its intent to purchase on such terms and conditions or better terms and conditions, the Distributor shall then be relieved of this option held by the Manufacturer.

In Witness Whereof, the parties hereto have set their hands the day and year first above written.

Miller Scraper Co.,

By /s/ Kenneth L. Miller.

Attest:

Industrial Equipment Co., Inc.

A Colorado Corporation,

By /s/ W. A. Reynolds,

President.

/s/ Royden Brown,

Secretary.

State of Colorado

County of Morgan—ss.

The foregoing instrument was acknowledged before me the 25th day of March, A.D., 1952, at five o'clock p.m. at Fort Morgan, Colorado, by W. A.

Claimant's Exhibit A—(Continued)
Reynolds as President of Industrial Equipment
Co., Inc., a Colorado Corporation.

Witness my hand and official seal.

My Commission expires February 16, 1954.

/s/ Thelma Tomky,
Notary Public.

The undersigned, Mary Miller, wife of Kenneth L. Miller, agrees that she will enter into and sign any and all necessary papers such as deeds of trust, chattel mortgages, and notes to facilitate and carry out the agreements agreed to on the part of her husband, Kenneth L. Miller.

Dated: March 20, 1952.

/s/ Mary Miller.

28014 — Recorded at request of First National Bank, Fort Morgan, Colo., at 46 min. past 11 a.m. May 26, 1952, Book 3170, page 62, Fresno County, California. I. E. Farley, County Recorder. By W. H. Watson, Deputy Recorder.

State of California
County of Fresno—ss.

On this 21st day of March A.D. 1952 before me, Miles J. Hansen, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Kenneth L. Miller and Mary Miller, his wife, known to me

Claimant's Exhibit A—(Continued)

to be the persons whose names are subscribed to the within Instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

/s/ Miles J. Hansen,

Notary Public in and for said County and State of California. My Commission Expires October 29, 1953.

List of machinery and Serial Numbers:

- 1—400 Amp. G. E. Welding Machine—1766004
- 1—400 Amp. Lincoln Welding Machine—A-109031
- 1—300 Amp. G. E. Welding Machine—1845018
- 1—300 Amp. P. & H. Welding Machine—244588
- 1—300 Amp. Hobart Welding Machine—DW-20930
- 1—400 Amp. Lincoln Welding Machine—A-101338
- 1—200 Amp. G. E. Welding Machine—2330586
- 1—300 Amp. G. E. Welding Machine—1845000
- 1—200 Amp Lincoln Air Cooled Portable Welding Machine—A-191455
- 1—Airco Camograph Cutting Machine—623042
- 1—Airco Radiograph Cutting Machine—11386
- 1—21" Canedy Otto Drill Press—A-3435
- 1—6" Black & Decker Bench Grinder—139823
- 1—Buffalo Bench Drill Press—B-1962
- 1—Wells Metal Band Saw—9795
- 1—Oster Pipe Threading Machine—JT532
- 1—Yale 2 ton Electric Hoist—None
- 1—12" Dual Grinder Machine—3790

Claimant's Exhibit A—(Continued)

1—Kellogg Air Compressor—D-211015

1—100 lb. Acetylene Generator—None

1—American Lathe 16" x 8'—41464

1—3 H.P. Motor for above lathe—4501

1—9" x 10' Roll—A19341

1—Hendy Shaper and Planer

1—Annealing over (made at Manufacturer's shop)
—None1—Hydraulic Press (made at Manufacturer's shop)
—None

List of Vehicles:

1950 Dodge 1/2 ton pickup—Engine No. T-172-37383

J. I. Case Tractor, S.O. Model—Engine No. 5102031

Certification Attached.

CLAIMANT'S EXHIBIT "B"AMENDATORY AND SUPPLEMENTAL
AGREEMENT

This Agreement, made in quintuplicate and entered into at Selma, California, this 4th day of April, A.D., 1952, by and between Kenneth L. Miller, doing business as Miller Scraper Co. of Selma, California, hereinafter called the Manufacturer, and Consolidated Distributors, Inc., formerly Industrial Equipment Co., Inc., a Colorado Corporation, a corporation, incorporated under and by virtue of the laws of the State of Colorado and hereinafter called the Distributor,

Witnesseth:

Whereas, the parties hereto have heretofore en-

Claimant's Exhibit B—(Continued)

tered into an agreement dated the 20th day of March, 1952, and now, for their mutual advantages, the parties have agreed that certain changes, alterations or amendments be made in the said agreement heretofore entered into by and between them; and,

Whereas, the Manufacturer desires to devote all of his time and efforts to the manufacturing and production of scrapers and the parts thereof, and to avoid the expense and problems of the sale and distribution thereof on the retail market; and,

Whereas, it is the desire of the Distributor herein to engage in the business of selling and distributing the scrapers and parts produced and manufactured by the Manufacturer herein,

Now, Therefore, for and in Consideration of the considerations in their agreement dated March 20, 1952, and of these premises, and of the promises, covenants and agreements herein contained, the receipt and sufficiency of which is by each of the parties hereto acknowledged,

It is Stipulated and Agreed by and between the parties as follows:

I. That paragraph 2 of said agreement of March 20, 1952, is hereby amended by adding to the sentence ending on the fourth line following the description on the top of page 2 of said agreement the following:

”, and also on all additional chattels and equipment hereafter acquired by the Manufacturer and on all items purchased or acquired, in whole or in part, from the proceeds of the loan, which deed of

Claimant's Exhibit B—(Continued)

trust and chattel mortgage, or mortgages, shall be a first and prior lien on all property pledged or given as security thereunder."

II. That said paragraph 2 is hereby further amended by adding to the first line on page 3 of said agreement the following:

"provided, however, that upon termination of this agreement or upon any substantial breach or default thereof by the Manufacturer, the loan shall be due and payable upon demand, at the option of the Distributor or lienholder."

And by deleting the first full paragraph on page 3 of said agreement and inserting in lieu thereof the following:

"The aggregate amount of the loan of \$75,000.00 shall be made available to the Manufacturer at the Selma Branch of the Bank of America and shall be disbursed to him, in accordance with approved banking and loan procedures, upon his request to pay existing liens and for the payment of obligations incurred in the construction of increased plant space for manufacturing and for additional manufacturing equipment, and no such obligations will be incurred beyond the amount of said loan unless they be paid for by the Manufacturer without a further lien against the property to be pledged as security hereunder, which would take preference to the liens, mortgages, and/or other encumbrances thereon of the Distributor herein. Interest is to be charged to the Manufacturer only on the amounts disbursed to him and only from the respective dates of such disbursements."

Claimant's Exhibit B—(Continued)

III. That paragraph 3 of said agreement of March 20, 1952, is hereby deleted and amended to read as follows:

“3. The Distributor agrees to purchase from the Manufacturer all of the output or production of said Manufacturer and agrees to accept all production upon completion at the Yard of the Manufacturing Plant of the Manufacturer; the Manufacturer and Distributor agree that all manufactured items are to be delivered to the Distributor F.O.B. Carrier, at Selma, California, or are to be stored and/or warehoused at the Yard of the Manufacturer at the direction of the Distributor, and that, in either event, title thereof shall pass to the Distributor upon the occurrence thereof; and the Distributor herein agrees to pay the Manufacturer in full for all items so delivered and appropriated by the Manufacturer on the 1st and on the 15th of each and every month after the date of the Manufacturer's compliance therewith.”

IV. That paragraph 4 (b) of said agreement of March 20, 1952, is hereby amended to read as follows:

“(b) The Manufacturer agrees to sell to the Distributor all products and items manufactured or fabricated by the Manufacturer. Such sales are to be made F.O.B. at the point of manufacturing and at a price to the Distributor of sixty per cent (60%) of the retail price list established therefor, save and except for parts; and the Manufacturer agrees that he will control his production and will not re-

Claimant's Exhibit B—(Continued)

quire the Distributor to buy or accept delivery of the Manufacturer's products when the Distributor's inventory of the Manufacturer's products includes one hundred (100) scrapers or, at retail list prices, amounts to \$300,000.00, whichever is the lesser, and will further produce the type and quantity of the products he manufactures or fabricates as are ordered by the Distributor, taking into consideration the Manufacturer's average production capacity under the existing circumstances."

V. That paragraph 5 of said agreement of March 20, 1952, is hereby amended by first striking the last three (3) words thereof and then adding the following:

"direct cost of manufacturing as established by approved cost accounting procedures, and since it is anticipated by the parties that the direct cost of manufacturing will be materially reduced through the increased manufacturing facilities made possible by the financing of the Manufacturer hereunder, the parties do hereby agree that from time to time, as the direct cost of manufacturing is reduced, the retail prices will be adjusted (notwithstanding the lack of any increases or decreases in materials or labor) so as to reduce the retail list prices on all products manufactured or fabricated by the Manufacturer, with the view of reaching the greatest market on the best competitive basis."

VI. That paragraph 6 of said agreement of March 20, 1952, is hereby amended by adding the phrase:

Claimant's Exhibit B—(Continued)

”, but not less than cost to the Manufacturer, plus ten per cent (10%)”

after the word “per cent” and before the semicolon, on line 7 of page 4 thereof.

VII. That the end of paragraph 7 of said agreement of March 20, 1952, is hereby amended by adding the following:

”; and provided further that in the event of the breach of the provisions herein by either party regarding the sale, assignment or transfer, or attempted sale, assignment or transfer hereunder, that the innocent party herein shall have the right to terminate this contract.”,

before the period.

VIII. That paragraph 13 of said agreement of March 20, 1952, is hereby amended by adding thereto the following:

“However, it is distinctly understood and agreed that the Manufacturer will not consummate or conclude any sale or disposition of the within properties without first further providing the Distributor the opportunity to buy or acquire the same upon the same terms and conditions and at the same price as that for which the Manufacturer has a bona fide offer and proposes to consummate or conclude the sale or other disposition thereof.”

IX. That paragraph 14 of said agreement of March 20, 1952, is hereby deleted and amended to read as follows, to wit:

“14. The Distributor, its agents, successors and assigns, do hereby agree that in the case of the ter-

Claimant's Exhibit B—(Continued)

mination of this agreement that it will not for a period of five (5) years, directly or indirectly, go into any business which will compete with the said Manufacturer, or his successors or assigns; nor will the said Distributor, its agents, successors or assigns, directly or indirectly, handle or market through its own sales organization, or through any sales organization owned or controlled by the Distributor, or any organization of which the Distributor owns a substantial interest, any items manufactured by the Manufacturer and distributed by said Distributor in the State of California or in the State of Colorado, or in any other State or Foreign Country or Section thereof or Division thereof, wherein the said Distributor has sold and/or distributed items of manufacturing nature manufactured and delivered by the Manufacturer herein to the said Distributor, it being expressly understood and agreed that this restriction shall apply only to items manufactured by the Manufacturer and distributed to the said Distributor under this contract, and that this restriction is to be severable in all respects as to those matters included herein in the disjunctive and is to be severable from the other provisions and paragraphs of this contract."

X. That paragraph 15 of said agreement of March 20, 1952, is hereby stricken and deleted therefrom, and that paragraph 20 of said agreement is hereby amended by adding thereto the same sentence as is by paragraph VIII above provided to be added to paragraph 13, except that the word

Claimant's Exhibit B—(Continued)

"Manufacturer" in each place used will be "Distributor", and vice versa.

XI. That an additional paragraph is to be added after the last period at the end of paragraph 26 of said agreement of March 20, 1952, and is to read as follows:

"That it is understood and agreed by the parties hereto that this contract is to be of no force and effect until executed by all of the parties hereto in accordance with the provisions of the laws of the State wherein the same is to be executed and that the signatures of all parties, including Mary Miller, the wife of Kenneth L. Miller, are to be acknowledged as in the manner required by the acknowledgment of instruments requiring the recording, and that all parties hereto, including the said Mary Miller, the wife of the said Kenneth L. Miller, will execute and sign any and all necessary papers and documents to give full force and effect to this agreement."

In Witness Whereof, the parties hereto have executed this instrument to be signed and executed the day and year first above written.

Miller Scraper Co.,

By /s/ Kenneth L. Miller.

Consolidated Distributors, Inc.,

A Colorado Corporation,

By /s/ W. A. Reynolds,

President.

Attest:

/s/ R. Brown,

Secretary.

Claimant's Exhibit B—(Continued)

State of Colorado

County of Morgan—ss.

The foregoing instrument was acknowledged before me, this 8th day of April, A.D., 1952, by W. A. Reynolds, as President of the Consolidated Distributors, Inc., a Colorado Corporation.

Witness my hand and official seal.

/s/ Thelma Tomky,

Notary Public in and for said County and State.

My Commission Expires February 16, 1954.

The undersigned, Mary Miller, wife of Kenneth L. Miller, agrees that she will enter into and sign any and all necessary papers such as deeds of trust, chattel mortgages and notes to facilitate and carry out the agreements agreed to on the part of her husband, Kenneth L. Miller.

Dated: April 4, 1952.

/s/ Mary Miller.

State of California

County of Fresno—ss.

On this 4th day of April, A.D., 1952, before me, Robert W. Enghatt, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared Kenneth L. Miller and Mary Miller, his wife, known to me to be the persons whose names are subscribed to the within Instrument, and who acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my

Claimant's Exhibit B—(Continued)

hand and affixed my Official Seal the day and year in this Certificate first above written.

/s/ Robert W. Enghabt,

Notary Public in and for said County and State.

My Commission Expires January 31, 1955.

No. 28015—Recorded at Request of First National Bank at 46 min. past 11 a.m. May 26, 1952, Book 3170, Page 73, Fresno County, California. I. E. Farley, County Recorder. By W. H. Watson, Deputy Recorder.

Certification Attached.

TRUSTEE'S EXHIBIT No. 9
AGREEMENT

This Agreement entered into as of the 23rd day of December, 1953, by and between Consolidated Distributors, Inc., of Colorado, a corporation, hereinafter referred to as First Party, and Kenneth L. Miller, Mary Miller and Miller Scraper & Manufacturing Co., Inc., a corporation, hereinafter referred to as Second Party,

Witnesseth:

On or about the 20th day of March, 1952, Kenneth L. Miller and Mary Miller entered into a contract in writing with Consolidated Distributors, Inc., of Colorado, then known as Industrial Equipment, Inc., which said contract was thereafter amended and supplemented by a contract dated April 21, 1952.

Pursuant to said contract First Inc., a corpora-

Trustee's Exhibit No. 9—(Continued)

of the present location and their shipment elsewhere over and above their normal freight from Selma, California, to eventual point of sale such excess freight may be deducted from the price thereof. Freight incurred for shipment to a point for repairs shall be at the expense of Second Party.

III.

Attached hereto marked Exhibit "B" is a list of scrapers now owned by First Party. Said scrapers shall be sold in the name of Miller Scraper & Manufacturing Co., Inc., as hereinafter provided and from the proceeds of such sales there shall be deposited to the account of First Party at Bank of America, Selma, the amount set forth opposite each scraper so listed. It is understood that certain of said scrapers are encumbered to the Bank of America upon a flooring contract to the extent of 90% of their original cost. The parties hereto shall cooperate to the extent possible (it being recognized that neither party currently has sufficient funds to pay the promissory notes secured by said contracts) to the end that said contracts shall be continued until sale of said scrapers. Such cooperation shall not require Second Party to incur obligations upon said notes nor shall default therein by First Party or any guarantor thereof or loss of said scrapers to said Bank constitute a breach of this agreement.

IV.

Second Party shall at their own expense place

Trustee's Exhibit No. 9—(Continued)

all scrapers described in this agreement in a condition to be sold and thereafter the scrapers listed on Exhibit "B", together with any scrapers hereafter manufactured by Second Party, or any of them, shall be sold in the following manner.

There is hereby established a sales division of Miller Scraper & Manufacturing Co., Inc. Said division shall consist of two salesmen employed by said corporation, one of whom shall be appointed by First Party and one by Second Party. The salesmen so appointed may be changed from time to time as may be deemed desirable by the party making such appointment. Said division shall likewise employ such clerical help as may be reasonably necessary. The proceeds of all sales shall be collected by and deposited in a bank account maintained by such division as a trust account and distributed as herein provided.

From the proceeds of the sales of each scraper there shall first be paid the cost thereof to the owner. When the owner is First Party the cost shall be deemed the amount set forth opposite the scraper listed in Exhibit "B". Where the owner is Second Party the cost shall be deemed to be the retail list price in effect from time to time less 35%. Discounts to dealers from retail list price shall be not more than 20% and 5% of retail list price unless the written consent of each party is first had and obtained.

After payment to the respective scraper owner

Trustee's Exhibit No. 9—(Continued)

written, made by First Party with third parties, their dealers or creditors, except as hereinabove set forth.

VII.

Second Party may withhold from the amounts agreed to be paid in paragraph I hereof for its own account the sum of \$546.00 in full settlement of amounts allegedly due and owing from First Party to Second Party for goods, wares and merchandise sold and delivered and office rental. First Party shall obtain the release of an attachment heretofore levied in an action entitled John Axman vs. Consolidated Distributors, Inc., of Colorado upon an assigned claim for one E. Van Bogart or in the event First Party fails to obtain such release Second Party shall withhold on account of such attachment until settlement thereof the amount of \$1562.18 until final disposition of said action.

VIII.

First Party shall furnish to Second Party and said sales division a list of all dealers and addresses with whom First Party has dealt, agreements and commitments made by and between First Party and said dealers, plates, movie film, advertising material and copies of dealers' correspondence.

IX.

Each of the parties hereto, their agents and employees, shall refrain from and shall not represent to third persons that they are in any manner connected with or representing the other party and

Trustee's Exhibit No. 9—(Continued)

that the contracts heretofore entered into between the parties hereto and/or Industrial Equipment, Inc., being the former name of Consolidated Distributors, Inc., of Colorado, and/or First, Inc., be and the same hereby are cancelled and discharged.

The parties hereto shall execute a joint letter for distribution as either party may desire to the effect that the controversies between the parties hereto have been amicably settled; that First Party is no longer the distributor for Second Party and that any and all dealers are free to deal directly with Miller Scraper & Manufacturing Co., Inc.

X.

It is further understood and agreed that First Party will deliver, or cause to be delivered, to Second Party, the said promissory note of \$75,000.00 hereinabove referred to, properly cancelled, together with all loan documents pertaining to the same; that they will execute a satisfaction of all chattel mortgages, reconveyances under deeds of trust, reassign all patents heretofore assigned to them as security, and should it be necessary for either of the parties hereto to sign or execute any further documents to carry out the purposes and intent of this agreement, each of the parties hereto, and their assigns, are hereby authorized and empowered to execute the same so as to properly give a full release to each of the parties hereto.

XI.

The parties hereto agree that said contract here-

Trustee's Exhibit No. 9—(Continued)
in and for the County of Fresno, to the complaint,
cross-complaints and counter-claims on file therein.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

Consolidated Distributors, Inc.,
of Colorado,

/s/ By Forrest S. Alkine,
President,
First Party.

/s/ W. A. Reynolds.

/s/ Kenneth L. Miller,
President,
Mary Miller,

/s/ By Kenneth Miller,
Attorney in Fact,
Miller Scraper & Manufacturing
Co., Inc.,

/s/ By Kenneth L. Miller,
President,
Second Party.

Exhibit "A"

Scraper Number — Customer — Account Receivable
Balance

41½ yards—

D-127—Dulaney Service Company, Box 420, Loop
13, Military Dr. South, San Antonio, Texas—
\$3,199.60

61½ yards—

B-90—Ray-Brooks Machinery Co., Inc., P. O.
Trustee's Exhibit No. 9—(Continued)

Box 551, Montgomery, Alabama—\$4,347.20

B-93—Ryan Equipment Co., 3350 Morgan Ford
Road, St. Louis, Missouri—\$4,347.20

B-96—Ryan Equipment Co., 3350 Morgan Ford
Road, St. Louis, Missouri—\$4,347.20

10 yards—

E-54—Ryan Equipment Co., 3350 Morgan Ford
Road, St. Louis, Missouri—\$8,018.00

Exhibit "B"

Description—Number—Location—Cost

41½ yard scraper D-0087—Othello Implement Co.,
Othello, Washington—\$2,526.00

41½ yard scraper D-0112—Boozer's Service & Equip-
ment, Winterhaven, Florida—\$2,826.00

61½ yard scraper (Note 1)—Morgan County Imple-
ment Co., Ft. Morgan, Colorado—\$3,968.32

Note 1: This scraper serial number is unknown.
It is a unit returned to Morgan County Imple-
ment Co. by a customer in exchange for unit
B-65 delivered to the customer.

61½ yard scraper B-86—Mixermobile Manufactu-
rers, 8027 N. E. Killingsworth St., Portland 20,
Oregon—3,704.51.

2 yard scraper A-60—Farmers Supply Co., Chan-
tilly, Virginia—\$1,265.00

2 yard scraper A-68—Travis Brown Equipment Co.,
Wichita, Kansas—\$1,155.00

41½ yard scraper D-0128—Hearne Equipment Co.,
Hearne, Texas—\$2,526.00

Trustee's Exhibit No. 9—(Continued)

6½ yard scraper B-97—Anderson Equipment Co.,

P. O. Box 14008, Houston, Texas—\$3,432.00

6½ yard scraper B-98—Dulaney Service Company,

Box 420, Loop 13, Military Dr. South, San Antonio, Texas—\$3,432.00

2 yard scrapers—

A-64	\$1,155.00	A-72	\$1,155.00
A-65	1,155.00	A-73	1,155.00
A-66	1,155.00	A-74	1,155.00
A-67	1,155.00	A-75	1,155.00
A-69	1,155.00	A-76	1,155.00
A-70	1,155.00	A-77	1,155.00
A-71	1,155.00		

3 yard scrapers—

C-364	\$1,770.00	C-372	\$1,770.00
C-365	1,770.00	C-373	1,770.00
C-366	1,770.00	C-374	1,770.00
C-369	1,770.00	C-375	1,770.00
C-370	1,770.00	C-376	1,770.00
C-371	1,770.00		

4½ yard scrapers—

D-0129	\$2,526.00	D-0132	\$2,526.00
D-0130	2,526.00	D-0133	2,526.00
D-0131	2,526.00	D-0134	2,526.00

[Endorsed]: No. 15456. United States Court of Appeals for the Ninth Circuit. Joseph L. Joy, Trustee of the Estate of Miller Scraper & Mfg. Co., Inc., bankrupt, Appellant, vs. Bank of America National Trust and Savings Association and Consolidated Distributors, Inc., a corporation, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: February 28, 1957.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 15456

JOSEPH L. JOY, Trustee of the Estate of Miller
Scraper & Mfg. Co., Inc., Bankrupt,
Appellant,

vs.

BANK OF AMERICA N. T. & S. A., a banking
corporation, and CONSOLIDATED DIS-
TRIBUTORS, INC., a corporation,
Appellees.APPELLANT'S STATEMENT OF POINTS
ON APPEAL

The appellant in the above entitled cause does hereby adopt, as his Statement of Points on Appeal and his Designation of Record on Appeal, the Statement of Points on Appeal and Designation of Contents of Record on Appeal filed by appellant in the District Court, together with the original exhibits ordered transmitted to the Court of Appeals.

Dated: March 18, 1957.

ECKHART A. THOMPSON and
JAMES M. CONNERS,/s/ By JAMES M. CONNERS,
Attorneys for Appellant.

[Endorsed]: Filed March 18, 1957. Paul P. O'Brien, Clerk.

